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Canadian Occupational Health and Safety Law:

Future Practice Perspectives

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Canadian Centre
for Occupational Health
and Safety

Canadian Occupational Health and Safety Law: Future Practice Perspectives

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and Safety

CANADIAN OCCUPATIONAL HEALTH AND SAFETY LAW: FUTURE PRACTICE PERSPECTIVES

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1.
Introduction

This paper is really in the form of working notes' . . . anecdotal and a diary by nature. It is a thematic piece aimed at professionals, and at public and private administrators and activists. I am attempting to suggest some practical objectives and an approach for occupational health and safety law in Canada today. To think of an animated body of law is perhaps illusory. This presumes coherence, formality, a sense of itself, objectives and self-direction. No such collectivity exists at present. It is unclear whether one can or should be brought into existence. Perhaps a hundred or more academic and practicing lawyers across Canada are presently devoting a significant portion of their work to occupational health and safety concerns. The number will grow. The concern is that this work be as informed as possible and clearly aimed at the "soft-spots" and at achievable goals. I do not here address myself to questions of the relative importance of law or of the ideological place of law in the scheme of things. This is an activist practitioner's piece.

Some elements of labour, in the union leadership and more so in the ranks, do not trust the legal process and law. This is completely understandable. I support informed skepticism here. Too often, working people and unions see their legal costs rise and ostensibly neutral legal and state processes become lengthy, complex, distracting, expensive and insensitive to worker needs. In any event, we have as much to fear from poorly trained or poorly directed lawyers as we do from law itself. What we need to build are more legal processes which are self-activated and more democratically accessible.

What has to be said is that neither organized labour, organized business nor the professions have placed the emphasis upon occupational health and safety law that the issue deserves. There has been a failure to internalize and integrate the area and to accord it the importance it merits. From my viewpoint, this failure in business and the professions is the least understandable and bears more serious import.

Amongst the professions, law, medicine and engineering are all of quite considerable prominence in occupational health and safety. So is business management. They do not relate as consistently and as well as they should at practical levels. There are a few natural inter-professional focus points. But professionals within each area tend to circulate intra-professionally amongst their peers. Many in law and medicine have an anti-professional bias if they work in occupational health and safety on the "labour side". The political and economic volatility of the industrial and labour-management worlds inevitably promotes interest identification.

At least one federal statute purports to recognize that a healthy workplace is of the order of a basic entrenched value within Canadian society:

Introduction
continued

*[T]he fundamental right of Canadians to a healthy and safe working environment . . .**

It is somewhat unusual to see the direct assertion of basic human values in Canadian statutes. The "purpose provisions" of statutes are generally only used in limited circumstances, as guides to the interpretation of the law where there is ambiguity or where there are equally competing legal alternatives. Nevertheless, here we have an expression of considerable breadth and of strong emphasis. This value should be endlessly cited and relied upon in all related occupational health and safety legal proceedings. It has to be given circulation, publicity and the vigorous support of active espousal and encouragement.

The objects of the Canadian Centre for Occupational Health and Safety draw this value more concretely by stressing not only that the workplace should be one of "health and safety", but that there is an obligation to promote "the physical and mental health of working people in Canada" (s.5(1) (a)). Each end can serve the other. Workers and occupational health and safety activists in business, unions, professions and government generally want to see much greater attention devoted to the workplace environment. The processes and results of work — physically, emotionally, intellectually, spiritually — transcend and infuse all of our social being.

2. Themes

There are a number of legal and policy themes which I feel demand concentration and elaboration in a wider audience. The topics selected for discussion in this paper are meant to reflect the following themes:

- concentration upon achievable reforms in high hazard workplaces in which Canada has a particular long-term economic interest, for example, resource industries, selected manufacturing;
- development of coherent legal thinking and practice across the body of Canadian law, both civil and criminal;
- accent upon improving the availability of useful legal remedies and forums by improving processes and standards to suit occupational health and safety goals;
- promoting openness, publicity, equality and democratic decision-making;
- opening legal remedies to those who are particularly vulnerable

* *Canadian Centre for Occupational Health and Safety Act*, S.C. 1977-78, c. 29, s.2.

Themes
continued

in the occupational health and safety economy: small businesses, women, non-unionized, high-risk industrial and manufacturing sectors;

- development of significantly expanded and deepened international presence and activity for Canadian occupational health and safety;
- merger of workers' compensation law with regulatory health and safety law/accenting prevention and rehabilitation as well as full compensation;
- more experimentation and diversification in remedies and forums; particularly, more selective, critical reliance upon the public regulatory/enforcement methodology.

3.
Legal processes

There are a great number and variety of legal processes involved in occupational health and safety law. It is surprising in fact how many different forums and processes exist. I have listed a number below, in no particular order of importance. What I think we have to do is to reflect more fully on how each of these forums and processes can be made to serve sound occupational health and safety ends. Obviously too, we have to assess where changes can be made in the allocation of relative resources amongst these forums and processes. Finally, how do they all fit together?

Civil court judgments and damage awards in cases involving defective products, design, engineering and other systems' liability, disability insurance, personal injury claims; regulatory prosecutions; medical and legal malpractice cases; statutory and regulatory interpretation.

Human rights complaints, commission and tribunal hearings: civil court appeals or reviews therefrom

Collective bargaining - labour contracts

Workers' Compensation law [13 jurisdictions in Canada; various and sundry appeal procedures within all of them; judicial reviews or appeals therefrom]

Provincial and federal standard/regulatory hearings and processes

Arbitrations Labour Relations Board hearings

Municipal by-laws and licensing, for example, smoking in the workplace, right to know, pollution controls, public and environmental health overlaps

Public health regulation and inspection

Commissions of inquiry

Legal processes
continued

Task forces; white papers; ministerial studies

Royal commissions

Provincial legislative process (including committees, hearings)

Federal legislative process (including committees, hearings)

Criminal prosecutions

Quasi-criminal prosecutions

Ombudsman investigations and reports

Professional ethics complaints

Coroners' inquiries and inquests; medical examinations or fatal inquiries

The Canadian Centre for Occupational Health and Safety could make a useful contribution in developing an international calibre occupational health and safety law database which contains all Canadian law. There is a great deal of either unpublished or uncirculated law. This will stimulate research, advocacy, publication and debate. Hopefully, it will lead to more a useful law.

The Alberta Health Law data base being developed by Professor Ellen Picard can be accessed and usefully coordinated, as can other data sources in Canada. One useful function all this would perform would be to reinforce publicity. There is a necessity to operate open, accessible legal and policy decisions in government regulatory bodies and in workers' compensation boards. A national database should actively promote and demand the publication of reasoned and significant regulatory case and policy decisions. Similarly with workers' compensation. Only one workers' compensation board in Canada has established a publication of its significant decisions . . . the British Columbia WCB Reporter Series Decisions (started by Terry Ison in 1973). The new Ontario "Workers' Compensation Appeals Tribunal", chaired by Ron Ellis, is preparing to publish selected decisions. And Québec's new "Commission D'Appel en Matiére de Lésions Professionnelles" is required by its statute to "establish a central bank of jurisprudence".

Canadian law is not organized around policy ideas. Generally, it is organized rather categorically and along functional lines. Particular social issues have not been stressed so much as has a utilitarian legal philosophy and pragmatic curricula meant to serve an entrepreneurial and managerial elite. Lawyers are trained in certain informational and intellectual techniques which, it is said, they can bring to bear on any other subject matter.

Legal processes
continued

There are actual law school courses in occupational health and safety law now. Some initial writing is emerging. Labour law courses and public administration, criminal, civil liberties, jurisprudence, civil litigation, social welfare, personal income security and torts law courses — as well as medical-legal courses — provide vehicles within which to have the issues addressed. There are tax, corporate, commercial and international law issues as well. Many graduate student papers in recent years show enthusiasm and interest. Field research and advocacy work can be very stimulating for students, allowing them to interview and be advised by workers, corporate managers, trade unionists, scientists, health professionals, engineers, inspectors, civil servants. Much useful local history work can be done eg. regional workplace coroners' inquiries, provincial regulatory/enforcement histories and profiles, local criminal and civil process.

Eric Tucker teaches an occupational health and law and policy seminar at Osgoode Hall Law School. Now in its third year, this started in the winter term of 1983. Tucker is part of a larger group of York University law professors with research and teaching interests in this area, which includes Reuben Hasson, Harry Glasbeek and Terry Ison. Previously, elements of occupational health and safety law were covered in courses such as administrative law, labour law and Ison's personal income security law. That has been the dominant emerging pattern in Canada in the last half dozen years. Leigh West has also recently offered a seminar at the University of Windsor Law School. Don Dewees and Katherine Swinton of the University of Toronto Law School both research and write in the area. So too does Rick Brown at the University of Victoria. Brown has also introduced workers' compensation into a social welfare course there. Hudson Janisch at the University of Toronto has produced a casebook in the basic first year public law course which includes ± 150 pages on the origins, history, structure and current problems in Ontario workers' compensation. I am not presently familiar with efforts in Québec in the civil law schools.

What follows is a general exploration of some of the possibilities for legal practice and legal intellectual work.

There has been insufficient opportunity for me here to map out approaches and issues in all of the legal processes cited. I have focussed upon a few areas: international conventions, processes, enterprise; human rights; product liability; coroners' inquiries and inquests; regulatory issues and deregulation. These areas were selected for two reasons: (a) they have not been the subject of sufficient academic attention in occupational health and safety law; and, (b) they illustrate that occupational health and safety law is a much broader, deeper and more complex area than simply the traditional government regulatory/enforcement model.

4. International conventions and processes

Worldwide, the ILO estimates 180,000 industrial deaths per year from injury and illness and 100 million workers injured. The international significance and nature of the issue is apparent. This perspective has been very dramatically presented by the "Bhopal incident". What we need to examine in Canada is the history and pattern of our international role, both in the private and public sectors.

The *Universal Declaration of Human Rights* contains a number of aspirations relevant to occupational health and safety. Articles 22 and 25 speak to social security protection, including protection for health, sickness and disability. Article 23 talks generally of a right "to just and favourable conditions of work."

The *International Covenant on Economic, Social and Cultural Rights* is more specific. Article 7(b) says that the state parties to the Covenant recognize the right of everyone to "safe and healthy working conditions." The *International Covenant on Civil and Political Rights* also contains an Article 7 saying:

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

Canada became a party to the *International Covenant on Civil and Political Rights* and its *Optional Protocol* in 1976. Failure to comply with Covenant provisions means that Canada is in breach of its international obligations.*

An individual Canadian citizen can make a complaint against Canada, whether it is Federal or provincial law involved. Complaints are heard by the United Nations Human Rights Committee.

The International Labour Organization (ILO) has produced a number of conventions on occupational health and safety. They are not well known here. An assessment should be done of whether any of these international covenants have been or could be applied in Canadian legal contexts. Our relationship to these

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* For one case of a successful complaint, see Sandra Lovelace v. Canada, Communicator No. R 6/24, CCPR/D/DR, Thirteenth Session, (31 July 1981). There Canada was successfully charged with breach of Article 27 arising out of s.12 (1) (b) of The Indian Act. Ms. Lovelace, a "Maliseet" New-Brunswick domiciled Indian, charged that the Indian Act provided for her to lose her legal status if she married a non-Indian. The same result would not apply to male Indians. This provision of the Indian Act has now been repealed. The Lovelace case contributed to that outcome. There has been at least one complaint alleging denial of justice in a Canadian workers' compensation complaint, out of BC. It was not accepted as the facts arose prior to the coming into force of the Covenant. See C.E. v. Canada, Communication No 13/1977, Second Session (25 August 1977).

International conventions and processes
continued

conventions in legal, administration and policy realms should be critically examined. The kind of representation we have had in the formation of these covenants is an issue. The ILO recently found (November, 1985) that various labour laws in three provinces have violated international conventions regarding the right to strike and freedom of association.

A number of the ILO Conventions are listed here together with an indication of which have been ratified by Canada:

RATIFIED BY CANADA	YEAR	NO.	ILO CONVENTIONS RE: OCCUPATIONAL HEALTH AND SAFETY
	1921	13	White Lead (Painting)
30/6/38	1929	27	Marking of Weight (Packages Transported by Vessels)
	1929	28	Protection Against Accidents (Dockers)
06/4/46	1932	32	Protection Against Accidents (Dockers) Revised
	1937	62	Safety Provisions (Buildings)
19/3/51	1946	73	Medical Examinations (Seafarers)
	1946	77	Medical Examinations of Young Persons (Industry)
	1946	78	Medical Examinations of Young Persons (Non-Industrial Occupations)
	1947	81	Labour Inspection
	1949	92	Accommodation of Crews (Revised)
	1959	113	Medical Examination (Fishermen)
	1960	115	Radiation Protection
	1963	119	Grounding of Machinery
	1964	120	Hygiene (Commerce and Office)
	1965	124	Medical Examination of Young Persons (Underground Work)
	1967	127	Maximum Weight
	1969	129	Labour Inspection (Agriculture)
	1970	133	Accommodation of Crews (Supplementary Provisions)
	1970	134	Prevention of Accidents (Seafarers)
	1971	136	Benzene
	1974	139	Occupational Cancer
	1977	148	Working Environment (Air Pollution, Noise, Vibration)
	1979	152	Occupational Safety and Health (Dock Workers)
	1981	155	Occupational Safety and Health

There are a number of obvious questions which emerge here. Are we actively promoting ergonomic considerations in our bilateral and multilateral trade and business arrangements? Are we manufacturing to our potential in industrial machinery and equipment on the safest design and engineering for workers both at home and abroad? Do we manufacture equipment and machinery for export

International conventions and processes
continued

and do we export designing and engineering in those sectors where we should be world leaders — forestry, hydroelectric, oil and gas, nuclear, telecommunications, mining, fishing, transportation? Why haven't we ratified these conventions and what steps are we taking, if any, to ratify these conventions?

Closely linked to the international flow of equipment, processes, machinery, technology and design is international information exchange. Do we provide foreign users with sufficient information to understand our workplace hazard exports? Do we share fully our information expertise in creating a broader more open international information flow and exchange? The work of the Canadian Centre for Occupational Health and Safety is of importance here primarily, I believe, in the importation of foreign information for Canadian users and *vice versa.*

Canadian occupational health and safety observers should have been on the ground in Bhopal, India in December, 1984 and continuously monitoring the situation.

Was anyone there from the Federal government or from the interested industrial or worker communities? Will reports be disseminated in Canada for our information? By whom? There are a number of issues of importance to us, not least of which is the operation of Union Carbide and other such petroleum or industrial chemical production facilities in this country together with our emergency community response capability.*

Union Carbide has approximately 40 plants in Canada making chemicals, industrial gases, carbon products for the steel industry and consumer items such as anti-freeze and batteries. Apparently they may not be engaged in pesticide production here.

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* Subsequent to the 3rd draft of this paper, (December, 1985), a small *Globe and Mail* story by Christie Maclaren alerted the public to the fact that indeed there was a "Bhopal Aftermath Review Steering Committee" chaired by D. Wayne Bissett, Chief, Chemical Industries Division, Environmental Protection Service, Environment Canada. It had 13 members (10 government; 3 business), none of whom represented public, environmental or labour interests. Its proceedings from July 1985 to December 1985 were, practically speaking, out of public view. It held regional hearings and distributed 700 summary report copies to a selected audience. It worked through 3 working groups and a draft (19pp.) Summary and Full Report. Some analysis of the legal implications has been done, particularly in terms of jurisdictional authorities, regulatory comprehensiveness and reporting requirements but nothing on liability, insurance or imposed prevention responsibilities. The corporate groups represented were the Canadian Fertilizer Institute, the Canadian Petroleum Association and the Canadian Chemical Producers' Association. The corporate spokespersons came from Gulf, Esso, Allied Chemicals, Petro Canada and Union Carbide of Canada Ltd. There is a 2 pp. July 1985 fact sheet outlining the review project and a 20 pp. discussion paper. The draft working groups' report in November 1985 runs to 73 pp., and contains some bibliographic material and other helpful appendices. It is not clear why the legal implications were not more fully assessed. A final report is anticipated. See, *Bhopal Aftermath Review: An Assessment of the Canadian Situation*, Environment Canada: Ottawa ISBN 0-662-93707-4 March 1986, 238 pp., appendices, bibliography.

International conventions and processes *continued*

[An Alberta Christian private business body, "Operation Eyesight International" diverted $100,000.00 to assist emergency efforts. CIDA, the Canadian International Development Agency, has provided $100,000.00 to help establish a permanent eye-care centre.]

The Bhopal legal points are of great interest to international commerce and insurance. Can a state maintain litigation on behalf of all of its national victims? The Indian Parliament is moving such a bill through. Would all Indian victims be bound thereby? There are some environmental precedents here. United States attorneys have been retained by the Indian government to sue in US courts on behalf of the Indian victims. United States lawyers have also brought actions in US courts. These latter cases are being consolidated in a New York court. These two actions will require sorting out as to who the victim representatives are. As well, the US parent claims that it is only Indian law in Indian courts which applies. This may have been a factor in why Union Carbide chose to operate there. This issue will itself be the subject of rulings in both the US and the Indian courts. Union Carbide's position out of the Danbury, Connecticut headquarters appears to be to settle quickly to avoid public and lengthy civil litigation. [Certain Indian state interests might also coincide with this strategy. But the larger international health and safety interests might not be met by a behind-the-scenes quick settlement.] The question will be whether US liability law applies to judge the factual situation in the Bhopal, India plant and whether damages are to be assessed on a US or Indian standard. One published estimate using US damages law, at up to approximately $50,000.00 US *per* victim, would put the compensation cost at plus $10 billion, the approximate reported 1983 assets of the US parent. The Indian subsidiary reportedly has assets of approximately $10 million. But many reports suggest a negotiated settlement in the $500-$600 Million range.*

From a policy point of view, the questions are whether the majority-owned US parent is responsible for local site mismanagement [if such was the cause, as the US parent claims]. As well, do US standards of operation have to accompany US ownership and/or US equipment and process patents? This has a great impact upon First World-Third World technology transfers, business investment, liability insurance and the chemical industry in particular. Canadian international enterprises will be affected by these issues.

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*It is instructive to note that Union Carbide's stock was selling for $32.75 *per* share shortly after the Bhopal tragedy. As of 27/12/85, a little more than a year after the accident, it was in the $73.00 *per* share range. Indeed, a company 10X smaller, the GAF Corp. launched a + $5 Billion takeover bid for Union Carbide. These facts suggest that the Bhopal event did no serious damage to Union Carbide's corporate reputation or market worth.

International conventions and processes
continued

In this connection, the Organization for Economic Cooperation and Development (OECD) is apparently investigating the development of a voluntary environmental code for multinational corporations operating hazardous industries abroad. Whether and how this would affect Canadian businesses and workers is unknown. There has been some call for an international body such as the United Nations Environment Programme to create an actual inspection service to provide countries with site checks of hazardous facilities. The national and international legal dimensions of these protocols and their enforcement are worthy of deeper Canadian investigation and involvement.

A US Union Carbide shareholder has filed a suit asking that the US parent company's directors be held personally liable for the damages on the theory that they had some knowledge of the hazards but took no action. To my knowledge, few, if any, such actions have been attempted in Canada. Directors are expected to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Our courts have tended to give a wide berth to directors outside the areas of fiduciary responsibilities and securities-related dealings. A more thorough examination of this topic is justified. Environmental health and safety measures, especially where Bhopal and Three Mile Island type disasters are a risk, surely are deserving of a director's careful attention without imposing onerous bureaucratic burdens on enterprise.

Statutory or regulated duties in our corporate laws might be adopted to better ensure that boards of directors and senior managers are involved to an appropriate degree in occupational health and safety. This kind of remedy may be more effective than broadening the scope for shareholders' civil actions. [In an unusual turn of events recently, the Ontario Workers' Compensation Board granted the right to sue a company's executive officer (although the company itself could not be sued) to a worker as an alternative to the usual benefits claim. (See *Berger v. Willowdale A.M.C. et al.* (1983), 41 O.R. (2d) 89) But the Ontario WCB inexplicably refused all other applications until a recent statute change closed the "loophole" which had allowed for the action against the executive in the first place.]

An Indian government factory and labour safety task force has already recommended sweeping domestic legal changes: holding management partners and directors responsible for safety; increasing fines for safety standard violations; pre-clearance of all industrial projects; equipment manufacturers accountable for all equipment failures.

One commentator has pointed out that both the USAID (United States Agency for International Development) and the World Bank make environmental-impact assessments of projects, for example,

International conventions and processes
continued

but provide very little in the way of training host-country personnel for long-term control or management capabilities.

The issue of accident or "incident" investigation is interesting; indeed, the widespread use of the term 'incident' is peculiar. International public interest would seem to demand a full open trial or inquiry of the entire matter. Business publications covered the news very heavily, virtually on a daily basis until the summer of 1985 and sporadically thereafter. There is a criminal investigation in India. There was an early and brief symbolic "detention" of Union Carbide's US President. There are at least two Indian civil investigations under way, one by the state and one by the national government. The US parent has released its own report claiming a lengthy pattern of local mismanagement and a unique combination of circumstances brought on by local negligence. And it does not rule out intentional sabotage. The carnage is being studied scientifically as a germ warfare crisis management trial run.

[In fact, at least one serious Indian publication has raised the question of whether the pesticide plant was a cover for germ or chemical warfare research.]

The Bhopal leak apparently brought to light numerous unexplained, previously unreported leaks of various chemicals — methyl isocyanate, phosgene, formaldehyde, chloroform and acrylonitrile — at a sister US plant. A Congressional inquiry ensued. The sister plant was closed in Institute, West Virginia, after a recent chemical leak and some plaintiffs launched a class action claiming approximately $3 billion in damages for 10,000 local residents.

There are parallels in the asbestos litigation in the US courts. The Canadian victims are not being represented as a group in the US bankruptcy court proceedings or in any of the important civil proceedings to my knowledge. Canadian mines, manufacturers and suppliers all have a significant stake in the outcome of these proceedings. Some official or informal Canadian observer status should be maintained in this forum as well. It is not known whether this has engaged the interest of our Justice, Health and Welfare or External Affairs Departments.*

Because occupational health and safety is largely a provincial matter, there is no national, comprehensive posture maintained. An example of this is in the forest industry. The Canadian Forestry Service has only one ergonomics specialist and no satisfactory general budget or policy approach to either national or inter-

* Outside the newspaper stories, there has been very little informed and serious commentary and assessment of Bhopal in Canadian public and professional publications. See, e.g., *After Bhopal*, Salil Tripathi, LXV Canadian Forum, Dec. 1985: 12-14.

International conventions and processes
continued

national occupational health and safety issues in the industry. This apparently applies to both the lumber and pulp sides.

The *Ocean Ranger* accident and Royal Commission Report are also instructive. The need for international cooperation in both safety standards and enforcement is underlined. Jurisdictional *hiatus* can occur in remote or complex situations; in that case, offshore semi-submersible exploratory drilling operations on the continental shelf off our Eastern Coast. As well, design failures were a key element to the accident, and with a rig of variegated international parentage in design, construction, staffing, ownership, management, maintenance and regulation, effective control of occupational health and safety factors is remote. The workers' compensation side of the story is also of interest. Leo Barry, prominent Newfoundland lawyer and leader of the Official Opposition feels that occupational health and safety legislation and workers' compensation legislation has to be extended as part of a comprehensive Continental Shelf Act. He acted for many families of victims and he feels that the *Ocean Ranger* mishap illustrated the inadequacy of the prevailing Canadian legal approach to damage assessment. He also wonders whether our workers' compensation system has become too paternalistic and unresponsive. He, like many other lawyers in other cases (including myself) experienced difficulty in obtaining WCB approval to sue in circumstances where a choice existed e.g. against a "foreign" corporate defendant. Newfoundland crews, US companies, international waters and assorted foreign designers of the semi-submersible all resulted in special and extraordinary arrangements for workers' compensation and civil suits. Attempts by Canadian victims to obtain damages in US courts against US defendants were met with some Congressional threats to pass what were, in effect, protectionist laws to keep foreign residents out of US courts.

One should, of course, be quite understanding of US protectionism here since Canadian law is so inhospitable to foreign plaintiffs in the area of workplace disease, injury and death. This is because we have no significant products liability law on a strict liability basis, no comparably high damages law (i.e. compared with the US), little in the way of practical class action procedures and broad bars to suit against domestic employers, at least by injured workers or dependants in the same jurisdiction. Canadian case law effectively precludes the use of punitive damages commensurate with the commercial rewards of exposing citizens to unsafe situations or dangerous products. I don't here advocate the wholesale adoption of the US approaches, but I do argue that we examine the utility of some of the US and European strict liability law as well as being cognizant of our comparative situations when it comes to negotiating information, service or financial exchanges in this area.

We have already reached the point where public international

International conventions and processes *continued*

mechanisms of dispute resolution, victim compensation, standards adoption and even inspection/enforcement are called for. This is particularly acute for Third World countries receiving second-hand industrial processes.

5. Regulatory issues

5.1 Overview

At the practical level of capital and labour control, the current deregulation ideology can have as one objective the removal of public constraints upon private decision-making. This is probably the dominant motive. In this respect, the current period is marked by capital attempting to draw the line on occupational health and safety regulation. Industrial disease regulation - as exemplified by Ontario's recent experience - illustrates the inevitable triumph of politically conservative bureaucratic standard-setting processes. Labour claims no major triumphs in this last decade.

This area is a hot potato for provincial Labour Ministers. One reason is that senior ministerial personnel are not generally selected on the basis of technical occupational health and safety/workers' compensation expertise. They are usually generalists with expertise as administrators or conflict resolvers and mediators. So they find the technical and policy work much more difficult to grapple with due to its unfamiliarity and its complexity.

On the corporate side, the corporate medical directors and industrial relations staff are often the effective spokespersons for private sector business interests. They may be technically competent, but they are often politically incompetent or lack managerial power when it comes to contributing to strong economic and political resolutions in favour of positive occupational health and safety results.

On the trade union side, the typical trade union leader, certainly in the private sector, is not technically competent. Again, with exceptions, it is not an area where policy emphasis/interest is particularly accented amongst trade union leaders.

Interestingly, I think, this atmosphere is one in which an exuberant political dynamic can promote health and safety headway, even if unintentioned.

Occupational health and safety regulation should be debated. The problem is trying to have a rational debate on this issue in the prevailing climate. Some deregulation can be sold to business and labour, quietly if necessary, without doing any damage to workplace health and safety. Improved job site attention to health and safety can be stressed within the enterprise. Education and information programmes are popular, relatively cheap and produce attitudinal results at least. But this shift would mean allocating more legal powers to workers, "decentralized regulation", and more enforceable legal responsibilities upon employers. It should also

Overview
continued

require distributive justice: that is, the burden of unavoidable health and safety hazards should be shared more evenly within the enterprise and our compensation policies should be expanded and improved to recognize real or projected income loss. It is often argued that we ought not to impose more severe, but necessary, occupational health and safety standards on older, less efficient and financially precarious industries. In general I cannot accept this. And, certainly, if workers' health is to be increasingly sacrificed to future cancer, heart and lung death rates in order to save jobs in dying industries, then the compensation package has to be renegotiated upwards. This is not happening. There is no negotiating mechanism. It is patently immoral to implement deregulation theories to reduce business costs on the one hand without equally improving vocational rehabilitation, pension and death benefits on the other hand. Increased benefits can be paid out of better invested and more equitably distributed existing pension reserve pools in both the private and the public sectors. The British Columbia Workers' Compensation Board has illustrated recently that investment return in the public insurance sector can be sharply improved by better management and legal changes to restrictive government fiscal control rules. But these benefits have to be distributed within the occupational health and safety market, for example, amongst the enterprises and the victims, not simply used to freeze or lower assessments, benefits and services.

At the same time, we should encourage public and private investment in the occupational health and safety industry which has some immediate, short and long-term employment and profit potential as well as improving the work environment.

This has not been the conscious goal of any public or private capital pool to my knowledge. Remarkably, the workers' compensation boards' capital pools have not been significantly used for this purpose, even in the research and development area. Some assessment of this should be done.

There has been some support in medical research and education areas. Many of the Canadian compensation boards have subsidized medical research into various surgical or treatment methods connected to compensable injuries. These have usually been justified on the basis of a potential reduction in the length of disablement and, thus, a saving in the outflow of insurance dollars. There have also been some subsidization of such matters as prosthesis research and occupational health and safety medical training. But even here, none of this, to my knowledge, has involved extensive investment in medical technologies over a long period of time with the conscious aim of developing a national and international product. And this kind of support does not aim at prevention strategies.

Again, to underline this point, why don't we have a deliberate

Overview
continued

public policy of investment in occupational health and safety promotion? This is too important a matter to be left to the vagaries of the supply-demand market. We have available significant quantities of insurance funds to assist in investment for research and development. We seem to have been quite reactive, passive and to have lacked entrepreneurial verve in the public insurance sector. There are a variety of legal methods available for financing and stimulation, use of WCBs being only one.

Insurance is likely to be with us for sometime yet . . . public or private; comprehensive income maintenance or the hodge-podge of disability source-defined types. Our task is to ensure that insurance rates, insurance assumptions and the investment of insurance funds carry the maximum positive impact upon occupational health and safety. This requires a closer relationship to the traditional regulatory function. Finally, here, it is obvious that occupational health and safety regulation has been conducted without significant legal ordering and articulation. When I was asked to provide a "legal" overview of the general industry regulations and the standard-setting process in British Columbia in 1974-75, I was rather surprised that this had never been done before. I suspect that most provincial and federal O.H.& S. regulatory law has developed in a not too dissimilar manner, particularly outside of Ontario and Québec.

Canada participates formally in occupational health and safety standard setting through various international forums and processes, e.g. the United Nations (UN), the International Labour Organization (ILO) and the World Health Organization (WHO). Agriculture Canada and Health and Welfare Canada have been prominent in appointing Canadian representatives. Legal protocols govern much of this activity. But the processes, actors, positions advanced, results achieved and the impact upon Canadian industry and Canadian workers are virtually secret from the occupational health and safety mainstream, the workplace and the public. It is privileged, secret international law-making. It has to be democratized and publicized.

5.2 Industrial equipment and technology

Our industrial equipment industries should be strengthened and improved. Safe products, whether mass consumer-oriented or not, will be competitive in well-regulated markets for the long term. If we strengthen international regulation and improve our product, then presumably we can enjoy both increased employment and increased health and safety.

The fear in many circles is that a political climate which encourages general reductions in public expenditures will threaten already fragile public regulatory resources with no corresponding assurance of health and safety levels being maintained by the private sector.

Industrial equipment and technology *continued*

A recent example of this in a cost-plus industry is the safety of nuclear industry workers. The Atomic Energy Control Board (AECB) has complained about National Research Council (NRC) budget cuts which could jeopardize the adequacy of monitoring programmes which aid private and public sector business activities in the areas of medicine, industry and technology research. Private budgets, then, would have to increase and regulatory setting and/or enforcement might in effect by transferred to the private sector. We ought not to assume automatically that these programmes are useful, valid and progressive but we must ask whether the same level of human health protection will be maintained?

The legal instruments of contracts, tax policies, grants and subsidies, customs and tariffs, and individual sectoral industry bargaining can be improved to emphasize better private and public regulation. These are more precise potential policy instruments than traditional regulatory schemes.

Meanwhile, the pruning of occupational health and safety regulations can go on. But pruning is only one horticultural exercise. Planting, fertilizing and cross-breeding are other functions to which attention is equally required in the regulatory area.

As well, there is a complex web of public or publicly-mandated occupational health and safety regulation through local, national and international formal and informal processes which are far more significant in aggregate than the narrow local regulatory process itself.

One of the most obvious examples is of course the American Conference of Governmental Industrial Hygenists (ACGIH), whose deliberations result in pollution and physical agent standards which most Canadian jurisdictions adopt holus-bolus with no thorough independent review mechanism.

Of the over 500 substance standards which the ACGIH sets as "guidelines", Ontario, a relatively sophisticated province, has thoroughly examined fewer than a dozen of these standards. They are listed in the sources and recommended reading. Some Canadians have sat on the various ACGIH committees. Membership is by appointment through committee chairmen; chairmen are selected by the Executive Board. The ACGIH specifically refuses to have official government recognition in terms of membership. This voluntary, individual-based membership helps keep the ACGIH out of court.

[Liora Salter, an associate professor in Simon Fraser University's Communications Department, is the Canadian expert on the ACGIH's processes and procedures. She has a chapter on this in her forthcoming book *Mandated Science* (co-authors: Leiss, Levy), Riedel Publishers: Netherlands (publication: late 1986).]

Industrial equipment and technology *continued*

This point was brought home to me forcefully again, at the IVth International Symposium on Hand-Arm Vibration held in Helsinki in May 1985. There, listening to acoustic engineers, medical researchers, and physicists from around the world, it became quite clear that the meeting rooms, lecture halls and social occasions* actually served as the forums of consensus out of which international standards developed in this case, affecting the allowable vibration and noise characteristics of chain-saws, mobile equipment, drills, polishers and a vast array of related machinery and tools in wide industrial use in Canada. We have perhaps as many as 200,000 Canadian workers exposed to serious HAV (hand-arm vibration) risk. [Brammer, 1984, NRCC Pub. No. 2284 4, p. 10].

If the interested parties can be required to focus upon comprehensive and serious regulatory reform, then we can critically examine issues such as removing unnecessary regulatory contraints on industry. But my initial view is that such an exercise is not really worth the effort in concrete health and safety terms. It may make some people feel better about fighting big government, but that is all it will do — assuage ideological temperaments. My view, which is widely shared, is that enforcement is as much or more of an issue than the regulatory standards themselves.

The Canadian Labour Market and Productivity Centre offers a potential vehicle to plug occupational health and safety concerns into significant business-labour decision-making. Training and retraining, labour adjustment assistance programmes and other productivity issues are on this bipartite agenda. The retraining and occupational placement of the hundreds of thousands of injured and disabled workers is a natural subject here. Our workers' compensation boards have not stressed active and mandatory vocational rehabilitation. Generally, the statutes have made vocational rehabilitation an optional, discretionary matter and workers have had no right, nor any obligation, to return to their pre-injury job, employer or industry. Vocational rehabilitation programmes are important instruments for worker training. This is not a well-regulated area in terms of deliberate legislative policies. We tend to pension off, perhaps inadequately, rather than re-educate, retrain and re-employ. Perhaps that is inevitable in some industries, or given some types of workers, but surely not in all cases of disability in all industries. Such an approach should be the last, not the first option. And then there are the trade-offs between productivity and health. Some workplace change — like close personnel surveillance monitoring and stepped-up medical surveillance of workers — is not good business if it increases stress, absenteeism and encourages mass worker unacceptance and

* I was startled when a German manufacturers' sales representative approached me at an evening reception suggesting I sit on a sub-committee of the Canadian voluntary standards body, to represent the interests of Canadian loggers, at a forthcoming meeting in Ontario.

Industrial equipment and technology *continued*

unhappiness. The VDT/CRT issues are also an example of the need to plan for and assist in the implementation of technological change with minimum adverse effects, a subject which comes clearly under the Centre's stated mandate. At the time of writing, the Canadian Labour Market Productivity Centre is still at the stage of identifying a role for itself. It appears to have a tendency towards information service. This approach would avoid the controversy which comes with criteria or standards adoption or oversight functions, but one hopes it would not also result in timidity and the avoidance of controversial issues.

5.3 The deregulation ideology

Some vision of the foreseeable future arises from studying current business and industry positions.

Deregulation is being heavily emphasized. Many thought this subject had lapsed, or been defeated, in recent years. It was thought in some quarters that senior industry health and safety representatives had accepted the 1981 Economic Council of Canada report. That report exhaustively reviewed the case for deregulation in the occupational health and safety field, and soundly rejected such an approach. But deregulatory preachers are amongst us again, with a new vigour and confidence. Deregulation has now been elevated to the status of a religious truth. Deregulation has always been argued in economic incentive terms, but it is now seen as part of a basic ideology or politics of anti-government: propounded by some government leaders and some parties, federally and in some of the provinces. Much of it comes from Republican think-tanks south of the border. This may well be a passing phenomenon, brought on by a crisis in capital accumulation and production, but its passing may be a lengthy one which leaves scars of difficulties for us in the future.

This period then has serious potential implications for occupational health and safety. The reason for this is that the government health inspectorate, health and safety regulations, the regulatory process, paperwork and government orders for costly improvements are equated heavily with notions of "big brother". Since expenditure cutting of all sorts, especially where it involves government demands, is also encouraged, the combination is potentially lethal.

Consider these recent facts in British Columbia, a province whose political leaders claim to represent the new politics. There has been an estimated 19.5% reduction in staffing levels at the BC Workers' Compensation Board since 1982. Engineering staff levels were cut — by an engineer. A law was passed in 1984 especially to protect the single domestic asbestos mine and domestic secondary users of BC-mined asbestos from having to pay fair damages to the diseased and dead victims of asbestos, where the victims have commenced or obtained legal relief outside of the jurisdiction. [See

The deregulation ideology *continued*

Sources and Recommended Reading]. The issue here is not simply that provincial employers are being protected. Asbestos, industrial disease, domestic employment and international trade are the issues.* Is the government making provision for British Columbia victims which will complement the effects of this measure? The legal interchange of information through discovery is frustrated. Will we now be open to reciprocity arguments in any of our nationals' civil actions against US defendants or in US courts? Are Canadian victims in other provinces affected insofar as either civil or workers' compensation processes are concerned? Québec has some corporate records laws which are being successfully used to frustrate discovery involving Québec mines in US plaintiffs' actions**. The US-Canadian-English-South African legal connections and implications are not well understood. Very extensive specialist study is required to understand these processes. What positive contributions can we make, if any, through legal reforms? There is significance for occupational health and safety here. Virtually no debate and no public attention focussed on this particular BC legislative change. Cassiar Asbestos, BC's sole producing mine, fully acknowledged that the amendment came at their initiative behind the scenes. In other words, no interest brokerage occurred either in conventional labour-management or parliamentary terms. It is unclear how much detailed examination this matter was given within the provincial civil service.

The lack of a consistent, working parliamentary committee forum does nothing to enhance sound collective legal and overall policy thinking about occupational health and safety. Other labour issues heavily dominate the policy concerns of ministers, parliamentary and labour critics and senior ministerial staff. No royal commission or public task force has examined these broad issues in British Columbia in twenty years. This is also a common pattern across Canada, with the exception of some specific Ontario task forces and commissions and the recent Quebec government white paper on

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* At the federal level, the Minister of Mines, Mr. Layton, has recently advocated the resuscitation of the Québec asbestos mining industry. This would be done particularly through exports to Third World countries. Obviously this would involve legal and moral footwork . . . keeping our own regulations loose or unenforced; skirting the stricter US regulatory market (OSHA and EPA); and, plying our trade in relatively unregulated Third World market places with captive, legally defenseless workers and consumers. 'Mr. Layton and Mines Ministry staff are working on a brief that will be presented to the US Environmental Protection Agency. The EPA is proposing to ban all use of asbestos in the United States and hearings on the proposal are scheduled to begin in July. The International Labour Organization also is looking at concerns about asbestos and worker safety.' Globe & Mail, 22/4/86.

** *Business Records Act*, R.S.Q., 1970, c. D-12, Article 2. The Québec government's recent direct involvement in the asbestos industry is well-documented and critiqued (with a good bibliography) in *Québec's Asbestos Policy: A Preliminary Assessment*, A. Brian Tanguay, Canadian Public Policy, XI: 2: 227-40, 1985. See also the numerous references to the Québec and Canadian asbestos mines and asbestos industry connections in *Asbestos: Medical and Legal Aspects*, Barry I. Castleman, Harcourt Brace Jovanovich, Publishers: New York, 1984. ISBN 0-15-004291-4.

The deregulation ideology
continued

occupational health and safety. That avenue, selectively applied, can be an effective legal methodology in both policy and political terms. The B.C. Construction Industry Advisory Safety Council [April 1982] is a positive example, struck under s.124 of the B.C. Labour Code, to deal specifically with construction injuries and fatalities.

Extremely severe changes have been made to the pensions of disabled people in B.C. Discretionary vocational and medical rehabilitation expenses and services are being heavily cut; cost-of-living indexes lowered or removed; virtually all permanent disability pensions are being scrutinized for fraud or whatever irregularities can be found; psychological impairments are arbitrarily being refused recognition; procedural rules are changed specifically to deter and defeat appeals; a reporter series of decisions (the only one in Canada from 1973 to 1985) was to be discontinued. Promised compulsory health and safety protection for farm workers, even of the most minimal kind, has been put on indefinite hold: farm workers' occupational health and safety policy seems to be made by the Federation of Agriculture, not by either the Workers' Compensation Board or the Labour Minister. One floated draft list of BC statutory changes would, for instance, remove the existing statutory public hearing requirement for occupational health and safety changes. Business favours that, since it is said to make pragmatic sense: now the individual enterprise or an entire industry, for example, could change the law overnight by a simple regulation. The safety rationale I have heard from business for this one is as follows: public hearings take too much time and are too costly so that innovation, whether managerial or technological, is stifled and frustrated. Safety improvements cannot be introduced by law quickly enough. But the case has not been made for this and, perhaps because of a clamorous opposition from labour critics, the proposed legislative change has been withdrawn for now at least.

The proposed legislative changes would also have either required Cabinet approval for regulations or make them Cabinet regulations rather than simply regulations of the regulatory body acting under a general grant of statutory power. This is not unusual in Canada. Thus, there is a further politicization (in traditional terms) of the occupational health and safety regulatory process. It is hard to see what expertise a Cabinet brings to this area. Cabinets are not even necessarily representative of the governing party's caucus. But this is a price that has to be paid in order for O.H.&S. to be given the general social recognition that it requires. We need to have political leaders, as well as union and business executives, involved in workplace health issues. The point here, however, is that rather than Cabinet, it should at least be public all-party legislative committees involved in reviews or assessments.

The B.C. Workers' Compensation Board itself is being restructured to run along the lines of a private sector corporation, rather than as a traditionally independent agency exercising sensitive

The deregulation ideology *continued*

quasi-judicial duties in the prevention and compensation fields. [A similar approach of sorts is apparent in Ontario. Under Bill 101, the Ontario WCB will now be managed and governed by a "Board of Directors", with a Chairman who is the "chief executive officer". See ss. 56,63. This may satisfy managerial imperatives, but it is instantly seen as quite inconsistent with historic notions of a judicial type function in a public insurance agency.] Moreover, all of these changes in British Columbia are made in an atmosphere of confrontation and paranoid secrecy. Labour is not often formally advised of the results of decisions, and is virtually never consulted as to proposed legal or operational changes.

This kind of approach infects bipartite relations as well. For instance, the BC Forest Industry Industrial Health Research Programme (FIIHRP) was being boycotted between 1983 and 1985 by the International Woodworkers of America (the largest BC wood union) due to unmet union demands for greater access and control. FIIHRP itself is an industry-initiated (1979) programme which is seen as a response to the unions' collective bargaining demands for a union-operated health and safety fund, funded by a levy on hourly payroll.

The IWA boycott started during contract talks in July 1983. The Union's written reasons for boycotting were that while $1 million in research dollars had gone to BC Research (a research agency on contract), it was alleged that BC Research had not taken positions sensitive to worker and union needs or demands on various health issues, for example, cedar dust and formaldehyde exposure levels. As well, the Union has claimed that none of the research has actually improved health and safety and that a number of serious issues have not been addressed (six are cited, for example, continuing fatalities and serious injuries, particularly in logging).

5.4 Generic performance standards

Only one recent writer [*Bryce*, Manager, Legislative Affairs; Occupational Health and Safety Division, Alberta Ministry of Labour] whose work I have seen attempts to argue that Canadian occupational health and safety regulation should take up generic performance standards. His work is being passed around in occupational health and safety circles, which is why I am concentrating upon it here. I think that Bryce's views have much more support in some industry and government circles than is publicly admitted.

Bryce [1984] argues that the "second phase of [Canadian occupational health and safety] regulatory reform will be characterized by a refinement and a reevaluation of the use of legal, quasi-legal and non-legal instruments for addressing the unacceptably high

Generic performance standards *continued*

levels of occupational injury and disease" [p. 41]. To me, it is highly debatable that there are only two distinct regulatory reform phases to date, the first of which was in the 1970s. What has happened before 1867 and from 1867 to 1967? One legal academic, Tucker [1984], appears to maintain [but based only on Ontario and English legal history] that the 1914 - 1960 period was a uniform developmental stage with no significant distinct reform directions. This is not yet thoroughly documented. More importantly, the movement to consolidate, which Bryce identifies as "a 70's issue", is not completed. But these are, in a sense, minor points.

I agree with Bryce's major point concerning refinement and reevaluation. It is advocated as well in this paper. Some of Bryce's notions will be used or abused. I believe they are at best misguided when it comes to his advocacy of generic performance standards.

Bryce predicts that Canadian jurisdictions will move to "generic performance regulations" and away from a mass of detailed industry-specific regulations. The evidentiary basis for his prediction is not disclosed. [In fact, he does not generally cite any bibliographic or informational sources for any of his assertions or predictions in his articles.] He defines a "generic regulation" as one which is general in two senses: it applies across industries; and it describes the health and safety objective but not the performance method.

Bryce goes on to argue that "generic regulation" is a good method and that it is a new method.

"Generic regulation" most assuredly is not a new method. It prevailed in early factory legislation and remains in wide and influential use today. For instance, Nova Scotia's health and labour statutes and administration have been under continuous criticism in large part for this very reliance upon "generic regulation". There are, and always have been, general performance provisions in all provincial and federal laws. These are the well-known catchall provisions which an inspector will cite. The key question, of course, is whether generic regulation is a "good" thing which we should all support.

The original Ontario Factories Act, 1884, contained this generic performance standard as a major provision:

> ***It shall not be lawful to keep a factory so that the safety of any person employed therein is endangered, or so that the health of any person therein is likely to be permanently injured*** . . . [Tucker, 1984, p. 280].

Generic performance standards *continued*

The "generic" regulation example which Bryce uses and advocates is this:

> *The employer shall ensure that all equipment used on his work site is maintained in a condition that will not compromise the health and safety of workers using, riding on, or transporting the equipment.*

He seriously argues that this type of generic performance regulation is all that is needed to regulate, for instance, the transportation of hazardous industrial cargoes by trucks on highways or the operation of crane equipment or man-hoists on a high-rise commercial construction project. Is Bryce naïve or is something else going on here?

The only obvious "good" he can point to is that such changes would reduce the number of specific regulations. It is not self-evident, however, that a reduction in the number of regulations is really worth worrying about, relatively, in our scale of concerns. Of course, we should streamline our laws, by reducing their volume wherever we can. Everyone is in favour of editing out the accumulated dross. But I have never heard any knowledgeable site supervisor or foreman or worker or manager argue that the major problem in occupational health and safety regulation is too many specific regulations. What they primarily object to are useless or erroneous regulations or, much more likely, government inspectors who think their job is simply one of totalling up a number of minor infractions on an inspection report and moving on to the next corporate victim. I suggest that Bryce would be hard-pressed to point to a single legal case - wcb claim, coroners' inquest, inquiry, prosecution, royal commission - in which the proximate cause of the accident was either a worker's or an employers' ignorance as to what the occupational health and safety objective of a regulation was, or confusion caused by too many regulations. Life on the job simply is not like that.

The official Canadian *Ocean Ranger* disaster inquiry (84 deaths) listed the cause as poor initial equipment design work and poor education/supervision on the job. Conflicting or too numerous regulations were not cited as the causes. It is a similar apparent scenario in Bhopal ($\pm$ 2500 deaths). There is no reason to think that single-injury accidents follow a causative pattern significantly different from disasters.

Logically, it is not a case of having less regulation. There is, however, a very good case to be made that we have had too much reliance upon regulation as a panacea, to the exclusion of other formal legal methods and processes.

Generic performance standards *continued*

Bryce does not cite any particular industry or country in which his proposals have been attempted at all, never mind successfully. Nor does he urge or rely upon the use of this mechanism in any other health regulatory field, for example, pharmaceuticals, food and water supply, air or other environmental pollution. But it may be worth pressing on with his arguments since we should not reject something simply because there is no precedent.

One very good reason why general performance regulations are duplicated across industry is because there is the very practical need to produce handbooks for each industry which line workers and managers can carry on their persons or have conveniently available on the worksite. In effect, you consolidate all applicable law, general and specific. His suggestions in this regard then are a step away from what involved industry people have wanted to see develop. In British Columbia, for instance, the multipartite Construction Industry Advisory Council's work [April, 1982] has resulted in a new, consolidated, portable, specific book of construction regulations.

A tragic flaw is, again, illustrated precisely by his own example. His proposal has no rational application to occupational health concerns (which is where most of our new thinking and effort may go), for example, the types and levels of toxic and carcinogenic substances in the workplace. If we replaced all or any detailed toxic and carcinogenic regulation by an objective regulation (of the example he uses) which directed the employer to keep a healthy workplace, the result would be an obvious disaster. Enlightened industry does not support this kind of thing, and Bryce, surely, must know this.

From a narrow legal point of view, he argues that his generic performance regulations "will provide some basis for measuring or determining compliance" (p. 42). That is precisely what they will not do. Such laws would remove all objective tests for compliance measurement within any one industry and across industries. It would again bring into being a situation of discriminatory, subjective judgment calls — by workers, union advocates, government inspectors, managers, supervisors — which will vary with expectation, interest, experience, economic criteria and the power relations on the particular worksite. It would introduce inequity across industries and within industries. It would, in effect, penalize the achievers . . . those companies and managers and workers who work to improve health and safety . . . since it would remove any verifiable, objective test of standardized measurement. Industry in Ontario and BC is in fact taking the opposite tack on the question of merit rating workers' compensation insurance. More precise objective indicators are being called for on grounds of equity and improved incentive.

Bryce's proposal, stripped of its adornments, is really one of

Generic performance standards *continued*

lawlessness. Everyone is by now well aware that conventional legal enforcement mechanisms have been frustrated by reliance upon the very type of regulation he urges. Responsibility, civil or criminal or administrative, cannot be properly apportioned and located where subjective corporate motivation is the determining issue, and where objective measurement standards do not exist. There are scores of unsuccessful criminal and quasi-criminal prosecutions against both companies and workers precisely for these reasons. It would, in fact, be grossly unfair to place formal economic or social responsibility upon an employer for not having gone far enough when the particular employer or industry is given no formal, public regulatory guidance as to how to manage for the occupational health or safety objective. Furthermore, all industries and all industrial hazards cannot be regulated in the same way, any more than we can expect all workers and employers to be equally motivated.

Bryce's reading of history is suspect. He boldly asserts that "the intention of early occupational health and safety legislation was that it would be enforced through the use of criminal sanctions", although he back-tracks on this later in this piece. In what country at what period of history did this state of affairs apply? Surely not in England in the earliest factory legislation days. This is well documented, for example, in the work of Bartrip and Burman [1983].

My sense, moreover, is that most of our detailed specification regulations came from industry itself. They have not been imposed by some meddling, ignorant, domineering "big brother" government. Industrial representatives lobbied government regulators to choose their techniques and their equipment standards to be the law, both because of accomplishment and for obvious commercial reasons. Workers and managers became government inspectors and regulators and took their "best practice" with them. This is, I believe, the dominant way in which occupational health and safety regulation grew and it is still the model today. This is what the ACGIH and the Canadian Standards Association (CSA) are all about: voluntary, industry bodies developing consensus standards on a best practice/cost scheme.

I agree with Bryce that there is a "growing public concern for regulatory reform" (p. 42). Most of the public are workers. There is a demonstrable, widespread social concern to improve environmental, public and occupational health and safety — everything from cigarette smoking through hazardous truck and rail cargoes to building and bridge collapses, pharmaceuticals, chemicals, plasma supplies and the nuclear holocaust itself.

Generic performance standards *continued*

Yes, as Bryce says, "government must now re-assess both their enforcement policies and their regulation-making programs to rationalize their use of legal instruments." But it is not just governments that should act. And of these issues, the clearly dominant problem has been identified as lax, inconsistent or purposeless enforcement, not over-regulation by government. Indeed, the "privatization" urge is widely shared. Labour's primary demand has been to accord decision-making, resource allocation and enforcement powers to workers and/or joint health and safety committees.

Bryce comes to his major point circuitously. What he really wants is deregulation, not rationalization. He plunks solidly for "voluntary codes of practice" (p. 42) and non-enforcement of occupational health and safety regulations by government fiat. As if these are not widespread patterns now!

Bryce moves on to make his fundamental motivational point (p. 43). He states that specific regulations theoretically act as a hindrance to innovation. No examples are given. Personally, I have never heard of a company being frustrated in improving health and safety because some inspector or the agency will not let them improve upon a regulatory standard to increase safety. Virtually all of our occupational health and safety law explicitly allows for departures, sometimes with procedural requirements for notice and consultation. [Workers and unions often in fact complain that deviations are too informally or too liberally granted.] In practice, this happens anyway in any reasonable government inspectorate. Innovation can be properly encouraged by a mix of discrete methods, such as informed and powerful joint occupational health and safety committees, merit rating or penalty insurance schemes, tax subsidy, patent, research and development and trade laws and policies. But he does not discuss these and I wonder if, for example, Bryce would oppose a legislated occupational health and safety research and development standard for any or all industries? What he is really arguing is for government to turn back the clock and begin abdication of law-making in favour of industry policing itself. What workers or unions want or need in this regard is not discussed. One very senior labour occupational health and safety representative with whom I spoke reacted to Bryce's views on this point by indicating that labour might agree to some generic performance regulations if workers were given sufficient legal powers to compel health and safety improvements on the job through educated, powerful health and safety committees, shop stewards and workers and through actual enforcement powers in their hands.

Bryce's ideas are not all either naïve, erroneous or malevolent. He strongly and sincerely believes in stimulating labour and industry initiative so that these parties do not simply adopt passive reliance upon government (p. 44). Most occupational health and safety professionals, I think, would agree with that aspiration.

Generic performance standards *continued*

Trade union and worker occupational health and safety advocates desire more legislated or more practical power for workers, not more government. It is a sound notion. This idea is partly, at least, what is behind the new Canadian Labour Market and Productivity Centre. But increased use of generic performance regulations is not the principal, or even an important legal vehicle to accomplish that task in the occupational health and safety area. Partly, he is asking too much of one method. And, as we know, when the crunch comes, voluntary codes and vague, generalized aspiration simply serve as an illegitimate excuse for the slothful and the prevaricators amongst us. As a matter of fact, it is voluntary, associational and major industrial groupings like the Canadian Standards Association (CSA), American Conference of Governmental Industrial Hygenists (ACGIH), American National Standards Association (ANSA), Society of Automotive Engineers Standards and Recommended Practices (SAE), British Standards Institute (BSI) and so on which precisely determine the actual content of much of our occupational health and safety law now. Bryce must also consider that there is very little technological or economic opportunity or incentive for a local manufacturing company, for example, to appreciably improve the health and safety capability of its own equipment, machinery, tools, buildings and production processes (over and above the occupational health and safety laws) if all these important factors are determined by international standards, and engineering, design and manufacturing performed, and perhaps even purchased, elsewhere by some other authority in the company or industry.

Real, meaningful, local initiative will come from motivated people on-the-job, from 'tool box sessions' and joint health and safety committees, not from generic regulation.

5.5 Research and development

It is generally considered that we have a relatively low level of research and development expenditure in Canada. As a proportion of our gross national product, we rank approximately fifteenth [15th] amongst the OECD countries. What is not clear is whether workplace health and safety is a recognized area of research and development and, if so, how significant it is as a proportion of all research and development. And a breakdown by industrial sector is warranted. [I want to leave aside here the many appropriate criticisms that we already blindly promote research when what we really need is practical, inexpensive action on the job site].

So far as I am aware, there are no legal requirements compelling business to engage in any level or type of research and development work. Seemingly, this could be done on formula keyed to capital flow and risk assessment. Or, workers' compensation assessments could begin to include such a component which would then bring the research and development within public control.

Research and development *continued*

Whether this is feasible or whether there are foreign precedents is unclear. It may be that incentives are the most politically acceptable (in this climate) form of legal methodology. If so, we are then required to examine our tax and direct grant/subsidy policies and to question what impact they have on occupational health and safety. Statutory methods may not be the only or primary vehicle here. For example, federal and provincial governments could utilize their powers as a contractor with businesses supplying goods or services to the government. This latter approach is now being examined (however tentatively) to enhance constitutionally protected equality rights provisions regarding the hiring, payment and promotion of women and minorities.

5.6 Interprovincial and international enterprise

The transportation of hazardous materials — often for or from industrial usage — is an increasing concern. The mode of transport itself is a workplace — principally by truck and railcar. Transportation accidents are a very significant category of ill-health. Numerous regulatory issues are presented by this problem. The health and safety concerns affect workers and the public. Deregulation is not on the agenda here, although new and different types of regulations are needed, together with adaptations in the mechanisms by which problems are identified and addressed. At least four Canadian provinces [British Columbia, Nova Scotia, Ontario and New Brunswick] have recently strengthened road safety rules for truck haulage in the area of securing loads. Overall truck safety may be an entirely different matter. But the nature of the industry is such that interprovincial and international cooperation is necessary to ensure equitable, efficient and consistent regulation. Regulation in one jurisdiction affects costs and practices in others. New York State, for instance, is a point of destination, origination and a through route for US and Canadian workers, US and Canadian vehicles and hazardous Canadian and US industrial loads and wastes. It is unclear whether reciprocal and reinforcing joint Canadian-US legal mechanisms are being utilized to the maximum benefit here.

Where hazardous industrial cargoes are moving through urban areas, by rail for instance, municipal, federal and provincial regulatory teamwork is necessary for problem and solution identification*. No one in the industry is urging deregulation.

* See Transport of Dangerous Goods Act, S.C. 1980-81-82-83, c.36, and regulations thereunder, which arose after the November 1979 CP Rail derailment in Mississauga, Ontario. Contact John R. Monteith, Director, Regulatory Requirements, Transport of Dangerous Goods, Transport Canada, Ottawa. Note that there were at least six serious railway accidents or incidents in Canada in February 1986 alone. One collision in Alberta has led to a judicial (Foisy) inquiry involving the CNR and their technological and crew safety issues. However, a 1986 Canadian Transport Commission report claims that there has been a steady decline in railway accidents during the past ten years. Globe & Mail, 6/5/86.

Interprovincial and international enterprise *continued*

Again, industry requires the best regulations, properly enforced. That is good business, since it will penalize the inefficient, unsafe operators and reward the efficient, safer operators.

Expanding or reinforcing enforceable but accountable legal powers in the hands of shareholders, management staff, workers and trade unions may be preferable to continued blind faith in the building of an expanded state superstructure. And traditional managment rights' powers will have to be positively utilized for fair and efficient health and safety improvement or else give way entirely in this area. Based upon the record to date, managements' inherent law-making powers are no longer justifiable in the public interest. Democratic policy demands this change in any event.

5.7 Summary

Almost exclusive concentration upon state regulation of, and state enforcement at the worksite may be doing a serious disservice to occupational health and safety. Many liberal and social democratic theorists seem to have a doctrinal fetish for enlightened state bureaucracy. Were it only so.

As a practical matter, we recognize that we cannot utilize the same type of workplace regulatory law regardless of the industry involved or the type and nature of risk. But this subject is not usually explored nearly in the detail required. Equally, it would be a mistake to assume that workplace regulation in Canada is of no different character than in any other country, developed western industrial or otherwise. If, in fact, Canada has a much higher tendency to import manufactured and high technology products which have industrial usage, then our efforts might be as well directed toward influencing the laws, standard-setting apparatus or manufacturing methods in the countries of equipment origin. This is where such initiatives as international products' liability law and international conventions are worth more effort. In the same vein, our customs tariffs on manufactured equipment, and instruments such as the Foreign Investment Review Agency [FIRA] would also merit attention. Is it a "significant benefit" to Canada if we are importing an unacceptably high risk to human health in the venture's technology, process or product involved?

Much of our traditional resource and manufacturing industry and technology requires modernization, for both environmental and economic reasons. The overdue massive expenditures and other measures required for environmental abatement of our Ontario-Québec manufacturing core may, perhaps incidentally, hold promise for occupational health improvements inside the plants. But that may be counterbalanced to an extent by improved toxic waste disposal systems if these systems simply reinforce a toxic industry which is so inherently unhealthy that its very existence has to be a core question for occupational health and safety. Law

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continued

cannot answer these questions. But legal processes and standards can be fine-tuned to assist in various resolutions to clarify the questions and to ensure open, public and informed decision-making processes. Occupational health and safety law has to become adaptable, variegated and better-informed if it is to play a more useful role in achieving these ends.

The market is not a universally efficient or effective regulator of occupational health and safety costs and benefits. This has been examined and illustrated time and again in the academic literature. If anything, the business and labour pressures are to improve on public regulation at all levels. The victims, business and organized labour want different public compensatory policies. Sections of labour and business, for some different reasons and with different trade-offs, want less government regulation and inspection where the government regulation and inspection is seen to be of poor quality, inconsistent or otherwise unconvincing. No one is claiming that occupational health and safety regulation has seriously crippled our gross national product or our international trade. If it has, here or there, let us see the evidence and decide whether the cost is not in fact worth bearing.

If deregulation theories were implemented across the board in the occupational health and safety area, there would be some significant, and perhaps unexpected, results. The late nineteenth-century to early twentieth-century labour-capital "bargain" was for workers to lose their "natural" common law rights to sue employers, in return for fair, universal worker/victim compensation together with a public scheme of regulated industries. If an object of a deregulation strategy was to remove all legislated barriers to market exchange, then the artificially created barriers to suits by workers against employers (and by employers against workers) would have to be removed. This might result in much higher transaction costs (perhaps on the order of a 100% increase or more, to use some estimates) and considerably higher costs in terms of labour-management antagonism, private insurance, much higher damage awards in individual cases, widespread inequities causing social dislocation and more adverse publicity. Perhaps it would directly improve health and safety conditions on the job here and there. But it is hard to visualize how this is, in aggregate, a system which offers fewer costs or more benefits to any of the interested parties. It could be a financial disaster for old and environmentally poor mechanized manufacturing industries, and for our resource industries.

The legal doctrine of common employment was abolished by the first English Workmen's Compensation Act, 1897.

The explicit government political rationale for this change was to put the worker ". . . in the same position as a member of the public in relation to his employer as far as a claim to compensa-

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continued

tion was concerned'' (Bartrip and Burman, 1983, p. 191).

This is an important policy goal upon which to reflect.

At that time, prevailing German statistics suggested that approximately half of all industrial accidents were attributable to chance, or, in the parlance of the day, an ''Act of God'' (p. 192).

Presumably then, general compensation policies would have a limited and indirect effect at best, especially as they applied to a particular employer.

The evidence seems to suggest that compensation policies — together with other legal regulatory and enforcement mechanisms — were intended to play a role in an overall prevention strategy. Insurance theories were mooted in terms both of the moral imperative of compensation per se as well as notions of workplace quality. Would mutual insurance, under public auspices, tend to a safer workplace? Or, would private benevolent societies and insurance coverage better encourage safety? Compulsory mutual insurance was considered by some business interests to be illogical from a safety viewpoint since it ''punished'' the employer (by both requiring compensation and leaving him open to other legal penalties) without making the worker ''more careful'' (p. 196). Of course, the obverse is as likely to be true in as many or more cases, and the notion smacks of an ideological basis.

Just as there should be an integrated personal income security scheme, so should there be as thorough an integration of workers' compensation and occupational health and safety. This is long overdue for a better test. There is no insuperable logical barrier between them. Policies in one area ought to be made to serve mutually reinforcing goals: assessment rating and recognition of industrial disease are only two of the most obvious points of intersection. It is interesting to note that both Ontario and Québec have introduced legal measures along these lines. The new Ontario Workers' Compensation Appeals Tribunal (independent of the WCB) is now accorded original and final jurisdiction over the right to sue manufacturers, employers, executives, supervisors and workers. See s.86g (1) (a) and s.15 in *W.C. Act*, R.S.O. 1980, c.59. In each of 1983 and 1984, there were approximately 50 such cases heard by the previous internal WCB Appeals Board. The new Québec Industrial Accidents and Occupational Diseases Act (Bill 42, 1985, c.6) establishes a new independent Board of Appeal . . . ''Commission D'appel en Matière de Lésions Professionelles'' . . . to hear compensation appeals on injury, disease and death claims. Additionally, the same body is given authority to hear appeals from workers' refusals to work because of health or safety conditions and from inspectors' closure or compliance orders relating to workplace hazards.

6. Coroners' or fatal inquiries system

There is some evidence that fatal inquiries or coroners' jury inquests and recommendations have had certain beneficial impacts upon industrial processes. The construction industry, for instance, seems to have attracted coroners' inquiries. No doubt this is due to the massive toll of death in that industry. Across Canada, construction accounts for approximately 20% of all deaths per year due to traumatic causes alone in the workplace. [See Employment Injuries and Occupational Illnesses: 1972-1981, Labour Canada, March 1984 ISBN 0-662-53002-0.]

As one academic commentator on the Ontario situation noted:

> *Indeed, it was not until the (Toronto, Ontario) Hoggs Hollow disaster in 1960 in which five workers were killed that the inadequacy of the existing regulatory system was brought to light, both with respect to state enforcement and employer responsibility . . . [S]ince the Hoggs Hollow inquest we have seen state activity in occupational health and safety regulation increase dramatically (Tucker, 1984, p. 285-286).*

In Ontario, it is now mandatory for there to be an inquest in all mining and construction fatalities. Field use and failures provide room for analysis and process or technological adaptations which laboratory work cannot duplicate. The issues here often have involved technical engineering and design questions and have affected the work of engineers and draftsmen, equipment manufacturers and construction design and supervision. Formwork and falsework and hoists (equipment and personnel) are only two of the most obvious construction areas largely affected by coroners' inquiries and inquests. Additionally, management and workplace supervision and rules have been examined, often in combination with engineering points. For example, what happens to an engineer's drawings after they arrive at the workplace? Who is responsible for site checking and revisions?

The advantages of a fatal inquiry or a Coroner's inquest are manifold. A public forum is provided for jury inquests so that the larger community can learn from and add to the process. Rules of standing usually allow for unions, the worker's family, the company involved and any other affected parties to appear. Both construction workers and engineers can be, and have been appointed for construction accident jury duty. In some provinces, statutory requirements or developed conventions lead to a selected jury of some practical expertise. There is a movement developing towards specialist coroners, for example, in transportation accidents, which might well be fostered in the occupational health area. There is a history of aviation accidents being investigated by increasingly expert teams under the federal jurisdiction. See the Dubin Inquiry and the Federal Aviation Safety Board. There were, however,

Coroners' or fatal inquiries system
continued

always questions about their procedures and reporting requirements.

Perhaps the most significant point is that since no formal civil or criminal guilt is visited upon anyone at the inquest, all parties can theoretically at least be more open to an exploration of causation unencumbered by possible financial or personal freedom loss. [Criminal or civil proceedings may, however, follow an inquest]

Yet, there are some well-known limitations in fatal inquiries or in coroners' inquests, which restrict their viability. For one thing, both unions and workers' families do not usually have the resources to mount a consistent, informed presence with expert assistance. They certainly are less able to do so than corporate parties. Corporate legal fees are income tax deductible. Legal aid funds are often limited or simply unavailable for this kind of purpose. Deaths due to occupational diseases are rarely inquested. The number and depth of inquiries of these types of cases is unclear. One of the major reasons for this appears to be that the victim often dies in hospital, and hospital deaths are rarely inquested. One reason for this is legal, in that our Coroners' statutes are usually interpreted as restricting their application to violent, unexpected or sudden deaths. This is capable of legal reform, either by changes in practice or by statutory amendment if necessary. Because many coroners are inadequately staffed or serviced, they are not anxious to give their statutory responsibilities a wider interpretation.

Another clear line of opposition to opening up disease inquests is the apparent strength of the medical-hospital community where a general tendency seems to exist to oppose detailed public legal examination of hospital or medical treatment deaths. [This kind of opposition is not peculiar to the medical community.] Unfortunately, the recent Grange judicial inquiry into the alleged digoxin murders at Toronto Sick Children's Hospital will reinforce this general tendency in many medical quarters. But that was an atypical case and is not a basis for generalizations about medical-legal procedures.

This traditional line of opposition need not really apply to occupational disease inquests since medical and hospital treatment would not usually be the issue. The basic issues of importance are the environmental pathways of causation and the most useful application here would be particularly where a past or future mortality pattern of an unacceptably high or of an unexpected nature was reflected or suggested by the individual disease and death. It is often the case that a single death serves to crystallize community concerns or to focus attention upon a troubling pattern of mortality, morbidity or other public health episodes. Here the coroners' legislation has to be given the liberal amplitude in its traditional legal focus on inquiry into ". . . who the deceased was and how, when, where and by what means he died." [B.C. Coroners Act, s.28]

Coroners' or fatal inquiries system
continued

Industrial diseases are probably reportable to the local Coroner under the reporting provisions of the provincial Coroners Acts. But there is no clear judicial ruling on the point where general wording provisions are concerned. For example, Ontario's statute imposes a duty on every person to immediately notify a coroner or a police officer of a death in a number of situations including those covered under the terms "misadventure", "negligence", "misconduct", "malpractice", "unfair means", or "under such circumstances as may require investigation". Those are all very wide terms. People should err on the liberal side and report all reasonably suspected industrial disease deaths to a Coroner or a police officer. Lawyers acting on estates should be well aware of these provisions and advise the estates and families as well. And Coroners should not defer to the Workers' Compensation Boards on interpretive questions.

In Alberta, there is a very progressive and all-encompassing provision specifically covering industrial diseases:

> [*deaths that*] *are due to any disease or ill-health contracted or incurred by the deceased, any injury sustained by the deceased, or any toxic substance introduced into the deceased as a direct result of the decease's employment or occupation or in the course of one or more of his former employments or occupations.* *

The coroners' system's application to industrial disease will take on even more significance with the introduction of general personal income security schemes which are broadly financed and which do not contain mechanisms for causation search in order to attribute cost. An aging population and heightened public awareness of long-standing carcinogenic and toxic dangers will also contribute to demands for use of coroners' inquiries into occupational disease.

Occasionally, medical treatment or identification might be presented as an issue at such an inquest. Matters such as the early detection, notification and proper treatment of an environmental or occupational disease are coming to be regarded with more serious concern.

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* R.S.A. 1980, c.F-6, s.10.

Coroners' or fatal inquiries system
continued

Two of the few recent English-Canadian books in this area are Marshall's *Canadian Law of Inquests**, and Granger's *Canadian Coroner Law***.

Marshall's book is almost entirely given over to procedural issues and is based on statute provisions and the existing, scanty, case law. It has no section focusing specifically upon workplace deaths, whether by trauma or disease. Granger's book is a much better and more comprehensive and detailed version of the procedural statutory and case law. There is one small section on industrial deaths, concentrating on the reporting requirements for traumatic deaths in some provinces (pp. 117-118). But, again, there is no concentrated study on the workplace issues.

Attorneys-General and their departments do not usually attach too much relative importance to this area of ministerial responsibility. It's a disgrace, really. Budgets for coroners' services may not be as strong as required. Coroners' jury recommendations are not necessarily enforced through a consistent, deliberate and persistent monitoring and mediation process. The practice and record varies across the country. Many critics want to see coroners' jury recommendations carry some kind of compulsory or enforceable status. Inexperienced coroners or juries can result in cumbersome, costly and ineffective recommendations, especially ones which simply call for numerous, specific government regulations. Compensatory damages either cannot be or are not awarded. Where evidence or parties are beyond the jurisdiction, the local coroners' court may be rendered practically ineffective. This is a very serious legal problem in Canada.

A larger criticism is that while the Coroners' system allows for open community inquiry in a no-fault atmosphere, by definition it avoids reinforcing social responsibility through criminalization. An unexpected, wrongful death is either proceeded with criminally or sent to a Coroner. Rarely does a coroners' court verdict lead to a criminal process.

Specialization of the coroners service in industrial deaths means more than simply one trained and dedicated coroner. It means having coroners' investigate staff who understand the workplace setting. It is traditional, for example, that police will appear on a workplace death site. But they have no specialist training as to the workplace itself. Total deference is usually extended to the occupational health and safety inspector. But the inspectorate itself may be as anxious as any party to avoid a formal public, legal

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* *Canadian Law of Inquests*, J. David Marshall, Carswell Co. Ltd., Toronto, 1980. ISBN 0-459-33350-x bd.

** *Canadian Coroner Law*, Christopher Granger, Carswell Co. Ltd., Toronto, 1984. ISBN 0-459-36460-x.

Coroners' or fatal inquiries system
continued

inquiry in difficult cases since their rules and enforcement patterns often become an issue in dispute.

One coroner has commented to me that the press is only interested in multiple, violent death situations and the like and will not report the more "routine" single industrial traumatic fatality. But environmental and occupational disease deaths, especially if studied publicly by reference to larger urban industrial populations, might generate some media attentiveness. There is also such a thing as promoting proper media involvement, which is often overlooked. An informed press doesn't just happen . . . it is shaped and nurtured like anything else. You have to get your story out.*

If inquests are to work properly, some national co-ordination of inquested workplace diseases and deaths should be attempted. This would include legislative matters and points of administrative detail. A starting place would be a more detailed review of how this area is presently being dealt with across Canada. One suggestion made to me was a periodic bulletin to coroners with, perhaps, an annual national seminar for two days or so to review the issues. It is quite amazing that this doesn't occur now.

It strikes me that pathology work in the area of suspected occupational disease deaths bears scrutiny. While my working experience is almost entirely in British Columbia, it has struck me that there can be a great variation in the manner and detail of certain kinds of pathology work, influenced by factors such as geographic location, time and expertise. Protocols do not seem to exist or they are not enforced. It is sometimes questionable whether there is sufficient exploration of carcinomas, for example, in regard to tissue sampling and other lab work. Unless the attending pathologist is alerted to concerns over the cause of the cancer, there will normally be no detailed or probative pathological work done along those lines. In possible environmental poisonings, the nature and extent of toxicological work is extremely important. Occupational diseases, *per se*, are not reportable on a national basis. Cancers, I believe, are reportable across the country. But what happens with these reports from an occupational health and safety and prevention and compensation viewpoint is questionable. Scientific and

* There are some excellent health and safety journalists in the Canadian print reportage media: Mick Lowe in Sudbury; Christie MacLaren, Bill Schiller, John Deverell, Linda Hossie, Linda McQuaig and Ron Labonte in Toronto; David Cohen in Hamilton; Suzanne Fournier, Terry Glavin and Rod Mickleburgh in Vancouver — to name a few of the more prominent journalists and writers in English Canada. Unfortunately, not enough of their stories appear in the business sections of newspapers or in the business press. My experience is that the business and management press, particularly in magazines and academic journals, rarely covers occupational health and safety issues.

Coroners' or fatal inquiries system *continued*

public health research work can be done, obviously.*

Victims can be properly compensated. Treatment may be enhanced. Occupational histories are now taken in some provincial jurisdictions after the registry is notified.

A regulatory reform approach may be advisable, together with a targetted educational programme in the urban public health, labour and medical communities.

7. Charter of Rights and Freedoms — human rights concerns

There is no opportunity here to canvass the multitude of *Charter* issues which may have direct or indirect application to the occupational health and safety area. See, for example, Paterson, CCOHS *At the Centre*, (1985) Vol. VII, No. 2; and, Paterson, *Occupational Health and Safety Canada*, (1986) Vol. 2, No. 2.

I simply want to briefly concentrate here upon two areas: equality rights and search and seizure. Two other obvious areas where the *Charter* could alter occupational health and safety law are: s.7, fair government regulatory or administrative procedures, such as in hearings, appeals and notices, orders and penalties; and, s.2's freedoms of thought, belief, opinion and expression as they may impact upon such as the right to know and the right to refuse. These latter issues are covered in the above-cited articles.

7.1 Equality rights

The federal government's initial legal views on the equality rights provisions are of interest. These provisions are contained in ss.15, 27 and 28 of the *Charter*.

Age, sex, religion and mental and physical disability are some of the enumerated grounds in s.15 of the *Charter*, which prohibits discrimination on any of these bases. This prohibition applies to all government action and laws. It encompasses employment but only "government" employment laws, activities or programs. An area of purely private business and industry — not yet defined —

* For example, there is the in depth interview epidemiological study of occupational cancers in males since the late 1970's in Montréal by Jack Siemiatycki et al (514-288-1551). A similar study with a larger population base but less detailed occupational histories (by mail questionnaire) is operated by the Epidemiology Division of the BC Cancer Control Registry, 600 W. 10th, Vancouver, BC (604-877-6000) V5Z 4E6 Attn: Dr Pierre Band. Starting in January 1983, the registry has now (Jan 86) compiled over 8,600 detailed occupational histories from cancer patients. It is, apparently, the largest study of its type in the world. The legal issues involved include considerations as to whether all cancers ought to be uniformly reportable and uniformly examined for occupational cancer victims be referred to automatic workers' compensation benefits and that industrial and worker communities be informed of results for prevention and education purposes.

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continued

will not be technically covered. Most private employment will not be covered directly by the *Charter*. As well, an exception will undoubtedly be made for bona fide occupational requirements relating to such as "physical disability" in individual cases.

A "*bona fide* occupational requirement" has been defined by the S.C.C. in this way:

> *. . . to be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety, and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job, without endangering the employee, his fellow employees and the general public.**

General and specific fitness requirements have always featured in employment practices and, in some cases, in formal occupational health and safety statutes and regulations. These fitness requirements feature in assessments as to which of "acts" and "actors", as opposed to "conditions" and "conditioners", are the principal causative agents in accident occurrences. Visibly disabled individuals are instantly perceived as an efficiently adjustable variable — don't hire them. Not so with a piece of equipment already in place on the shop floor.

Effective discrimination will undoubtedly be caught: that is, the concrete adverse impacts of apparently neutral laws which, regardless of intention or motivation, result in discrimination. Both unintentional and adverse effect discrimination will likely be proscribed.

There are some very fundamental legal notions to be explored in this area including, e.g., the idea of "disability". This term has widely different formal and informal meanings in a variety of legal, social and economic applications.

The age restriction provisions in many labour and occupational health statutes will also be affected by s.15: blasting certificate holders, working underground and so on. Mandatory retirement

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* *Ontario Human Rights Commission et al-and-Borough of Etobicoke* [1982] 1 S.C.R. 202 at 208.

Equality rights
continued

practices also have a physical and mental ability aspect insofar as the safety and health of the public or other workers is concerned. Evidence such as accident and injury rates might be relevant to ascertain *bona fide* occupational purpose and for the *Charter's* s.1 evidentiary purposes. There have already been a large number of cases on this issue under provincial or federal human rights legislation and in labour arbitration proceedings.*

There is, very often, a tension between a company's efficiency or productivity demands and, on the other hand, the individual's fitness or health which accompanies or underlies the occupational health and safety context. Management has been accustomed to having efficiency or productivity issues recognized as solely a management prerogative. This necessitates changes in managerial attitudes and practices which can have certain overall practical benefits for occupational health and safety in general, i.e., reliance upon more objective measurement criteria rather than upon traditional subjective assumptions.

Decisions have to be justifiable, for instance, about whether equipment, machinery or processes can be changed to counter-balance increased or otherwise unacceptably high risks in order to hire the physically disabled. Since this is the kind of careful, focussed and rational judgmental process we expect concerning job health and safety conditions in any event, the Charter's proscriptions could help sharpen our overall enterprise methods. The Federal government (1985) asserts, in relation to age:

> *The concept of* bona fide *occupational qualification may be applied where it can be established that the age limitation is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee (p. 17).*

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* A few case examples where occupational health and safety issues arose in the context of a discimination complaint are: Villeneuve-and-Bell Canada, 85 C.L.L.C. 16, 135 (1985); Ontario Human Rights Commission-and-Borough of Etobicoke, (1982), 1 S.C.R. 202 (S.C.C.); Bhinder-and-Canadian National Railways, (1981) 2 CHRR D/546; on appeal at 4 CHRR D/1404 or (1983) 2 F.C. 531; S.C.C. judgment on 17/12/85; now reported at (1985) 2 S.C.R.561; 63 N.R. 185; 23 D.L.R. (4th) 481; Michael Ward-and-CN Express, C.H.R. Act, TD 1/82; McCreary v. Greyhound Lines of Canada Ltd. and Eastern Canadian Greyhound Lines Ltd. (1985) 6 C.H.R.R. D/2512. The issue of pre-employment medical exams has been probed in a number of cases. See, e.g. Andruchiw v. Burnaby (1981), 3 C.H.R.R. D/663 (B.C. Board of Inquiry); Manitoba Human Rights Commission v. Brandon (1981), 2 C.H.R.R. D/382 (Man. Human Rights Commission); and, Re Occupational Health & Safety Branch (Sask. Labour) and Voice of the Handicapped, (1981), 2 C.H.R.R. D/261 (Sask. Human Rights Comm.) To follow the Federal and provincial human rights cases, readers may wish to contact CANADIAN HUMAN RIGHTS REPORTER (C.H.R.R.) at Suite 802, 224-4th Avenue South, Saskatoon, Saskatchewan S7K 5M5.

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That statement is, in fact, a risk assessment standard which should give rise to considerable litigation in the occupational health and safety area if accepted by the courts and, if, as expected, it is extended to the physical disability area. Corporate medical directors will be called upon either to give expert testimony or to help organize its accumulation and presentation for legal purposes. Literature on accident causation and accident rates will be involved. It will be debated whether the removal of persons with susceptibilities to preclude further exposure is allowed. Cardiac and physical or mental stress issues will arise. Some pilots and other occupations — police and military — are required to retire at fixed early ages or on seniority bases on the danger-to-others type rationale. My experience is that distinctions are not always clearly or consistently made in this area. Many times there is little or no evidence of an objective risk measurement technique having been applied. It is often uncertain whether the safety rationale is on the basis of an increased risk to the individual, to fellow workers or to the public (be they customers or otherwise). There is some moral or philosophical support for tolerating an increased risk to the individual where it would not be tolerated when the risk is increased to others. But our recent legal approaches to compulsory seat belt protection and compulsory motorcycle helmet protection would indicate that no distinctive protection will be extended to those individuals who present an increased risk only or primarily to themselves. Employers argue that their workers' compensation costs may rise in any case of death or serious disability, no matter who is the victim.

The crudest regulator of risk has been whether someone was prepared to do the job and whether the employer had an economic incentive to have the job done . . . supply and demand.

The kinds of objective questions for which we need answers are: what is the risk, who is endangered, what level of risk is unacceptable, how do we measure the risk and any variations in that risk, what criteria do we use to assess acceptability?

The medical and scientific objects of some of these points will be increasingly debated in civil courts and in administrative evidentiary settings. Both increased and new demands will be placed upon our standards for adjudicating medical or scientific controversies.

As the Federal Paper states (p. 17-18) with regard to age:

> *An employer must adduce evidence on a number of factors including the precise nature of the duties to be performed and the relationship between the aging process and the safe and efficient performance of these duties. This evidence must be more than impressionistic. The employer must demonstrate objectively that the conditions of work require a skill that may diminish*

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with age and that the job involves dangers for employees or the public that may be compounded with age.

There is an alternative to mandatory retirement — individual assessment. If there are medical tests that can be administered on a regular basis to predict individual ability to perform the job adequately and safely, it would not be necessary to have a uniform retirement age.

However, it is not clear that tests currently exist which are able to measure not only present capability but future performance.

This last paragraph emphasizes the potential importance of some of the questions here for medical surveillance in the workplace. Medical intrusions are bound to increase upon job entry and during the course of employment if mandatory retirement is ruled unconstitutional *per se* or severely curtailed by the *Charter.*

These pressures will add to further consideration of the use of specialist medical/scientific courts or arbitration panels to make officially mandated rulings on medical or scientific facts which are in controversy and require adjudication for legal purposes. [This kind of development has already occurred in both the workers' compensation and occupational health and safety contexts. WCB's have increasingly moved to the use of specialist consultants (historically, chest cases, such as silicosis, were handled by medical review panels or individual specialists to initially assess or to adjudicate disputed claims). In Ontario recently, for instance, with Bill 101 (4th Sess., 32nd Legislature; S.O. 1984, c.58; Royal Assent, 14/12/84) a new Industrial Disease Standards Panel (Dr. James Ham, Chairman) was established (see s. 86 p) as well as a panel of Cabinet-appointed medical practitioners (see s. 86 h).]

Countervailing human rights considerations arise in different ways, which will require subtle variations in response. Will we constitutionally protect the right of the mentally or physically handicapped to obtain employment at objectively verifiable increased risks to themselves where we would not when the same or similar risk is one to other persons, either fellow employees or to members of the public who do not work in the enterprise?

Will the accepted initial decision-making or risk assessment function be of the employer's employed or selected doctor or medical staff or of medical expertise chosen by the prospective employee? Is risk assessment a medical or scientific decision in any event, or really an administrative/legal decision which relies upon certain medical or scientific input, for example, the precise physical abilities of an amputee? A major legal factor here is that unionized employees can challenge occupational fitness rules and rulings through the grievance arbitration system. But prospective employees generally cannot do so, and will have to rely upon

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administrative or civil remedies applying provincial or federal human rights legislation or the *Charter*.

The direct impact upon the contours of job health and safety of these issues is limited but potentially quite significant in indirect ways. Suppose that women can no longer be barred automatically from employment in premises where there is exposure to lead. Surely this would accompany a tightening of the lead standards for workplace contamination. Or, suppose that human rights challenges to biomedical surveillance shifted from emphasis on workers' blood (as at present) to the workplace condition itself. The increased legal focus here will generate considerable attention and demand considerable resources. And it will have symbolic significance. It will serve further to heighten awareness of the human rights aspects of occupational health and safety in the medical monitoring and risk assessment areas. Legal judgments in this area will not only have profound direct impact upon the workers or prospective workers involved, but will also have incremental, precedential impacts for other areas of occupational health and safety law.

The Supreme Court of Canada recently wrestled with a major case which pitted human rights concerns four-square against occupational health and safety rules. In *K.S. Bhinder and the Canadian Human Rights Commision -and- The Canadian National Railway Co.**, a baptized Sikh refused to comply, on religious grounds, with a company rule which would have required him to wear a hard hat over his turban. The Supreme Court was divided on the outcome, with the Chief Justice in dissent. The compulsive, universal occupational health and safety rule was accorded greater social significance by the court majority than the man's religious dictates.

Unlike the Human Rights Tribunal, the Supreme Court majority felt that the company should not be forced to allow Bhinder to forego his hard hat and accept the somewhat greater risk of injury to himself. The Court majority explicitly rejected the notion that the company's *bona fide* occupational requirement should be altered for the individual's civil rights. Furthermore, the Court did not see any merit in making distinctions between cases where there is a greater risk only to the individual concerned and cases where there is a greater health or safety risk to other employees, as well as to the individual worker. Because it was not a full court and it was divided with Chief Justice Dickson in dissent, and because it was dealing with some rather specific technical language in the federal Human Rights Act, we may see some further refinement in these approaches in the coming years.

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* Judgment rendered by S.C.C., 17 December 1985; now reported at [1985] 2 S.C.R. 561; 63 N.R. 185; 23 D.L.R. (4th) 481.

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continued

Disability, age or sex discrimination might be treated differently than adverse religious impacts, although this is unlikely. As well, human rights tribunals and courts will still usually try to accommodate differing social goals. Under some statutes, this is dealt with by a requirement that the employer accommodate the exceptional individual up to the point of undue hardship to the company. But for the moment, the *Bhinder* case stands as a strong indication of how Canadian courts will handle such cases in the future under the *Charter*: a strong preference for the health and safety rule, assuming it is reasonably and honestly necessary, of course.

7.2 Inspection, search and seizure*

One regulatory-enforcement issue worthy of mention here are occupational health and safety inspectors' entry, search and seizure powers on commercial premises under a variety of provincial and federal statutes as compared with s.8 of the *Charter*. Section 8 reads:

> *Everyone has the right to be secure against unreasonable search or seizure.*

Many occupational health and safety statutes do not explicitly state that warrants, notice or even reasonable grounds are required for either a routine inspection entry, a search for documentary or physical evidence or a compulsory shutdown of equipment or the business itself. Practices followed by the occupational health and safety agencies vary as to procedural approaches, e.g., hearings or appeal rights. The Federal Government's Statute Law (Canadian Charter of Rights and Freedoms) Amendment Bill proposes new warrant requirements for either searches or routine inspections in approximately thirty-six (36) federal statutes, including some with remedial health and safety purposes. The Federal government's position is to distinguish between routine inspection visits and evidentiary searches, and between inspection of homes and inspections of commercial premises. Further, exemptions would be made for exigent circumstances, such as threats to life or safety. Whether our courts will follow this model and perhaps exempt all or most current occupational health and safety regulatory/inspectorate legislation and practice is unclear. Section 1 arguments will feature heavily. That is, there will be a strong tendency to uphold such requirements as demonstrably justifiable reasonable limits in "a free and democratic society."

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* *See generally: Reid, A.D. and Young, A.H. "Administrative Search and Seizure under the Charter", [1985] Queen's Law Jo. 392.*

Inspection, search and seizure
continued

And there will likely be some considerable variations in response in the provincial Supreme Courts and Courts of Appeal until more authoritative guidance is provided in the Supreme Court of Canada [see Justice Department's Information Paper (January 1985)].

In the United States, the Fourth Amendment to the US Constitution prohibits unreasonable searches: that is, a search without a warrant. In *Marshall v. Barlow's Inc.* 436 US 307; 98 SCt 1816 (1978) a majority of the US Supreme Court held that in searches under the *Occupational Safety and Health Act*, where the company did not consent to the search, warrants were required. There has since been a considerable amount of litigation and controversy in the US courts over what standards are required for the issuance of a warrant i.e. the usual strict criminal "probable cause" or a relaxed administrative civil standard. This may vary with whether the inspection is routine or in response to a complaint. There are also litigious controversies over the scope of the inspections allowed under the warrants. Seizure of evidence and closures of equipment, machinery, processes or entire workplaces raise other issues. It is fervently hoped that we in Canada will not enter into a legal quagmire of this kind.

The Ontario Court of Appeal recently ruled that Employment Standards Act inspectors could enter business premises, search for business documents and seize business documents, all without either a warrant or evidence that the Act had been breached. The justification for this was said to be:

> *The standards to be applied to the reasonableness of a search or seizure and the necessity for a warrant with respect to criminal investigations cannot be the same as those to be applied to search or seizure within an administrative and regulatory context.**

The court cited a 1983 Ontario Law Reform Commission Report which stated that express authority to enter lands or premises, without a warrant, is granted in 223 provincial public statutes, 61 private statutes, 86 regulations, and numerous by-laws. While the case did not deal with closures or production limitations, if this reasoning predominates in other Canadian appeal courts and in the Supreme Court of Canada, there will not likely be any change to current occupational health and safety regulatory inspection work practices.

If anything, summary occupational health and safety inspection is based upon more compelling social grounds than the types of

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* *Re Belgoma Transportation Ltd. and Director of Employment Standards* (1985), 51 O.R. (2d) 509.

Inspection, search and seizure *continued*

matters covered under employment standards i.e. wages, hours of work, benefits.

8.
Making the polluter responsible: product liability or else what?

Consumer activists, trial lawyers and many judges . . . view the vast expansion of the liability of American business in recent years as an effective way to compensate the injured and to force American companies to make product safety a priority. *

Canadians sit on the sidelines and gaze — bemused, horrified, envious — at the spectacle of US tort law, particularly products' liability. The news is filled with stories of civil suits involving occasionally huge jury awards, sometimes lengthy and complex multi-party proceedings, the odd corporate bankruptcy (threatened or real), disputed scientific evidence and findings, strict liability, rising insurance costs, and disputes between insurers and insured.

Some of the US products' liability suits primarily or substantially involve workers' exposures — asbestos and other cancer-causing agents and toxic chemicals such as benzene, formaldehyde and various pesticides and herbicides.

My view is that we Canadians . . . individuals, and governments particularly . . . ought to set aside some of our anxieties and trepidations and move from spectator status to investigators and participants in this process. Canadian asbestos mining companies have long been involved (perhaps quietly) in the broader corporate groups organized to defend plaintiffs' suits in US courts. Some of the Quebec and British Columbia mines have already undertaken significant political lobbying, and administrative and legal work to this end. Workplace safety and health demand that we ask some hard questions about the potential utility of strict product liability individual and class action suits or some alternative scheme which can provide as good or better results. This is not suggested as a replacement for formal administrative regulation and the government inspectorate, only an additive.

There is a particular application to workers' compensation here. Across Canada since the 1915-1920 period, the general legal picture is that workers (and their dependants) and employers have been prohibited from suing one another over workplace injury, death or disease. (Although it should be noted that this has not always and equally been the case. For instance, workers could still elect to sue fellow workers in British Columbia until 1974.)

* Taylor, Stuart (Jr.). New York Times. Business Section. March 10, 1985.

Making the polluter responsible: product liability or else what?
continued

This general prohibition to suit has applied both to the personal injuries and consequent income loss suffered by employers. This *quid pro quo* or deal — the "historic bargain" — struck first in Ontario in 1915, is still very widely supported in industry and labour circles. This fundamental legal deal protects and harmonizes the essential labour-management relationship, holding neither party civilly at fault. It avoids judicial conflict and controversy between the parties and provides for some certain compensation for all workers in a shared public insurance pool. The judicially administered fault-based alternatives are unpalatable for a variety of reasons. [Many lawyers, particularly civil plaintiff's barristers, think that any bar to suit is inherently unfair. I do not share that view.]

But this historic legal arrangement has no theoretical justification whatever in a number of important circumstances where the workplace hazard has arisen from outside the employment relationship. Where the cause of injury, disease or death was due to some defect in the original manufacture or design of equipment, machinery or tools, why should the injured worker's employer have to pay the worker's compensation costs plus absorb all the property damages and lost production due to the accident? Why shouldn't the worker be allowed to recover against the manufacturer or designer directly, either by suit or by an administrative scheme of insurance levy and compensation particularly when higher damages may be available in a large category of cases?

Yet, in most provinces, the workers' compensation statutes have been interpreted to mean that not only can the worker not sue his own employer but the worker cannot sue any other employer covered under that jurisdiction's scheme, even where the other employer's responsibility is one arising from his role as a manufacturer, supplier, maintainer/repairer or designer of the defective tools, equipment, machinery or chemicals in question. [Alberta is one province where this is not the case. There, s.16(2) specifically limits the bar to civil suit to "the employer of the worker". And in Ontario, another Schedule II employer can be sued by a Schedule II worker or his subrogated employer.]

There is no logic or equity in this situation. A worker is in fact legally entitled to "elect" to sue a manufacturer, supplier, maintainer/repairer or designer over their errors if the employer is from another province or another country. But not if the offending party is from the same province. On top of this, workers and their dependants are extremely poorly informed of their existing legal rights. So, even in circumstances where they could sue a third party manufacturer or supplier outside the jurisdiction, they seldom do so as they are unaware of this legal possibility. Unless it is an extremely serious case, they are unlikely to obtain legal advice. The legal advice obtained is often uninformed. Across Canada, there does not appear to be any mechanism established by the

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Canadian WCBs to ensure that workers or their dependants are properly advised in such cases. Even where there is an election made by the worker to sue a manufacturer, for instance, some Canadian WCBs refuse to pay compensation while the action is taken. This is simply unconscionable, since the WCBs are all entitled to a return of the proceeds of any such action to the extent of their payout to date.

Finally, the Canadian WCBs are all "subrogated" to the worker's (or dependant's) rights to sue, where such rights exist. That means basically that the WCBs inherit the worker's legal rights. But the Canadian WCBs have a truly dismal record in terms of conducting product or manufacturer's liability suits. They have rarely initiated such actions even though they have relatively vast resources at their disposal and two very good incentives to act: they could save the WCB accident funds considerable amounts of money by judicial recoveries; and they could turn over excess judicial damage awards or settlements (above the compensation payable) to the workers or their dependants. The WCBs are doing neither right now. The traditional area in which WCBs exercise their subrogated claims are in workplace automobile accidents . . . "fender benders" . . . as they are known in the trade. These types of settled claims serve no useful workplace health and safety prevention purpose because they are rarely aimed at the automobile or truck manufacturer or designer. And these types of claims seldom produce significantly more compensation for the worker victims than has already been obtained under WCB except in occasional cases.

Overall, the greatest loss here is that we have not developed a socially sensitive set of laws regarding the health prevention and compensation duties of manufacturers, producers, suppliers and maintainers/repairers in the workplace setting. Basically, this legal regime encourages irresponsibility. Our occupational health and safety regulations attempt with great difficulty to control or eliminate a multitude of hazards already imported into the workplace. They don't regulate external producers directly. The external producers of the workplace hazards do not pay any of the consequent workers' compensation costs, even in cases where they wilfully conceal the dangerous properties of their products or chemicals or in cases where they were grossly negligent in production standards or design. It is well beyond time that this situation was reformed. The need for some type of legal reform here parallels the necessary development of a universal comprehensive personal income security scheme (covering all accidents or disabilities) and is quite consistent with it. There should be greater compensation for victims covering all economic losses and pain and suffering. Employers would only pay an insurance assessment for those hazards which they themselves created or could control. Adverse publicity and increased costs would at least occasionally be visited upon the real hazard producers by a strict liability civil

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scheme or by some equivalent such as administrative cost allocations or penalties. There would be more public and legal attention directed towards the real focus of hazard production and responsibility.

It is also important to note that a variety of mechanisms could be used to achieve reform in this area. Resort could be had to post-accident arbitration rather than judicial remedies, but this would require considerable statutory change. Statutory amendments, again, could provide WCBs with powers to allocate costs against the actual producers of the injury or disease. What I am saying here is that the judicial remedy for a product or enterprise liability scheme is only one option and perhaps not the best. The recent US experience is extremely useful to us at least in forcing us to be more critical about our own legal situation.

Civil product liability suits may offer some attractive potential as one supplement to the present regulatory model. The plaintiff's action at least appears to offer a more democratic, accessible legal model than our conventional reliance upon government regulation. Socialist legal theoreticians aside, health and safety labour activists and many trade unionists are as disenchanted about the state as they are about lawyers and courts: at what is seen to be an unresponsive, slow or politically conservative state apparatus: standards development, risk assessment and enforcement. Our law generally does not allow citizens' suits to force discretionary government powers to be exercised. A power to inspect or set standards is not an enforceable duty. There is no general duty to regulate or enforce to any abstract standard. Regulatory processes are not always open or governed by rules of fairness. Enforcement is seen to be benign, uneven, and plagued by restraining "political" controls. Perhaps the major response by unions and rank-and-file activists has been to stress an effective internal workplace responsibility system — the right to know, to refuse and to participate, the employer's duty to disclose hazards and the structuring, with training and powers, of joint workplace committees.

Product strict liability suits offer potential as a complementary additive to this foundation. An individual, theoretically at least, can actuate the process. Class actions can be provoked. Local conditions can be addressed by attention to a centralized, causative agent, the designer or manufacturer. It is felt in some quarters that faulty design may be responsible for half or more of all product failures today.

Civil discovery can be an extremely valuable investigative technique. The plaintiff, for example, can force manufacturing representatives in engineering, construction and design to provide oral testimony under oath regarding scientific research, testing, methods, costs and so on. Documentary evidence can be discovered, both historical and current.

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In this way one of the major limitations upon employers and employees can be overcome: access to information. Regulatory agencies in the occupational health and safety field have not illustrated any significant use of their documentary discovery powers, even where they are legally available.

As well, the real source of the problem can be the focus. Often the workplace problem is imported through a supplier or manufacturer. The employer company may lack market power to force product changes or, even, details as to manufacture and risks. Workplace adaptations, even with worker-employer co-operation, may be of little use. A particular province may not be able to afford a regulatory ban or major product improvement because of its market condition. Increasingly, the problem is with state-of-the-art technology, processes and chemicals which range across entire industries and legal boundaries. Equipment manufacturers and the chemical and petroleum industries are prime targets for this type of action.

It seems, from the surface at least, that industrial reaction to the successful suit can be wholesale product change, either by removal or adaptation. So, there can be benefits, perhaps, of both a national and international order.

A question which needs answering is: what particular workplace health changes can be pointed to now as a result of the US, European and other products' liability experience? This requires more critical assessment. Some assessment can also be made of the types and numbers of industrial accidents occasioned, for instance, by defective equipment in the workplace. I believe that fairly reliable statistical coding exists here across the jurisdictions sufficient to the purpose.

Finally, another obvious benefit of the litigation model is that publicity is attracted, acting as a spur to much wider social interest and involvement. It is often felt that adverse publicity is a greater deterrent in fact than is the damage award itself.

Nevertheless, as I say, many respectable legal intellectuals are fundamentally unconvinced about the utility of products' liability tort law to achieve any meaningful general end result in safer products. The most common telling argument is that the market deterrence theory does not work. A number of reasons are cited. For instance, liability insurance disguises and spreads the costs. One commentator [Abel, 1981], has taken it to this point:

> *Indeed, the mythical efficiency of the market is often invoked to oppose all regulation, or at least to require agencies to con-*

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form to the fictitious criteria of cost-benefit analysis, as in the attacks on OSHA by capitalists, the Supreme Court and now the Reagan administration.

He goes on to urge a "socialist approach to injury and illness" which has these components: subordinating compensation to safety; equalizing risk throughout the population; and restoring control to those who undergo danger [Abel, 1981, 209].

From a practical point of view, an effective overall Canadian products' liability law is, at the very least, a long way in the distance. The reformers are divided. And the manufacturers, insurance and legal establishments either oppose or fail to help any significant reform on either the prevention or compensation side. We have not embraced strict liability and we have no meaningful class suit law. Our civil court costs and delays are on the increase. Extremely significant national statutory reform would be required and there is no effectively powerful current political lobby with an interest to pursue that end. Our judiciary are unresponsive and substantially opposed to this general direction in tort law. Some "progressive" critics (Belobaba, 1983) even consider that strict liability would be a regressive reform, so driven are they by the universal 'no-fault' compensation ideal.

What is of some interest here is to ascertain just what use has been made of the subrogated third party claim by the various Canadian workers' compensation boards in the industrial product design and manufacture area. It is suspected that little concentrated attention has been devoted to this area, which is unfortunate. As explained earlier, third party enterprises can be sued in most jurisdictions, although intrajurisdiction manufacturers and designers may not be amenable to suit. Only those operating outside the jurisdiction of injury may be reached. And industrial diseases, due to the long latency periods and the difficulty in pinpointing etiology, offer other distinctive problems.

Until such time as a more satisfactory workplace compensatory and regulatory regime emerges, it is incumbent upon counsel for workers and trade unions to aggressively challenge the WCBs on their subrogated third party claims. More such actions should be attempted both by private counsel and by the WCBs against suppliers and manufacturers. It may even be that in appropriate circumstances, the WCBs should be sued at least for gross negligence in failing to identify and pursue such third party suppliers or manufacturers victims. I do not know of such an action having been taken in Canada to date. There is a real question as to what fiduciary duties, or other obligations if any, the WCBs owe to disabled workers or survivors to pursue such claims on their behalf. As far as the insured employers are concerned, any recovery from third parties should reduce their wcb assessments.

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A very crude breakdown of these cases shows that employees win roughly 2 out of every 3 cases. In some of the cases which workers lost, the basis of the loss was unrelated to the legitimacy of the refusal to work.

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There are also unreported decisions arising under s.32 of the Ontario Occupational Health and Safety Act. These involve appeals from inspectors' decisions. For example, an inspector may inspect after a workers' right to refuse has been exercised under s.23 and an inspector may make a decision which can be appealed by a constructor, worker, owner, union or an employer. These appeals are taken to the Director of Industrial Health and Safety Branch, Occupational Health and Safety Division, Ministry of Labour.

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Alberta's Occupational Health and Safety Amendment Act, 1983, E.G. Fisher and I.F. Ivankovich, Relations Industrielles, Vol. 40, No. 1 (1985)

Fact and Fiction of a Model Enforcement Bureaucracy : The Labour Inspectorate of Sweden, Stearns (1979) 6 British Journal Law and Society 1

Product Design Liability, R.F. Schaden and V.C. Heldman, Practising Law Institute : New York, 1982. See c.7, "The Industrial Injury", at p. 111-136. The advantage to society in allowing a worker to sue the machine designer is to ensure that better and safer machines are designed (112). The vast majority of work-related injuries are caused by one or more outside forces : a machine manufacturer, a supplier, an installer, a property owner, a general contractor (118). The standards of such agencies as ANSI and OSHA do not usually contain prescriptions for safe machine design (125). The OSHA regulations, first enacted in 1970, apply only to employers; only employers are held liable for inspections, enforcement and fines for code violations. But the OSHA standards that were intended to apply only to employers have now, for the most part, been adopted as the standard of safe machine design in the industry (125). The courts' rationale is that a machine designer must design the product for all its foreseeable uses, even for foreseeable negligence of the employer failing to guard the machine (126). A manufacturer of industrial machinery has a duty to foresee human error and preoccupation and to protect against it (127).

Terminal Shock: The Health Hazards of Video Display Terminals, Bob De Matteo, NC Press Ltd. Toronto, 1985 ISBN 0-920053-30-0 (pa.) See esp. cc. 13 and 14 entitled 'Legislative and Other Initiatives' and 'Workers' Compensation and Legal Liability'. There is now a 2nd ed. out in 1986, ISBN 0-920053-87-4 (pa.). $11.95 running at 240 pp., 73 illus. & tables, a bibliography and index.

Federal Interagency Task Force on Product Liability : Final Report, Executive Summary, US Under Secretary of Commerce, Washington, D.C. 1978. (24 p.)

This extensive US government report estimated the number of US product liability claims filed in 1976 as approximately 65,000. It was further estimated that workers injured on the job accounted for approximately 11% of the product liability claims paid, but that these claims accounted for approximately 42% of total bodily injury payments. Workers' compensation insurers and self-insuring manufacturers or distributors are able to recoup some of their compensation costs through the subrogated product liability claim although the study suggested these had only a "very minor impact" on workers' compensation. Apparently, these cases were an important cause of product liability insurance rate increases as applied to industrial products in the target industries studied.

The report also surveyed the issues involved in liability for industrial equipment manufacturers, considering cost apportionment between manufacturers and employers on some efficient method which would potentially lead to a reduction in product-related workplace accidents. It was felt that the manufacturer of a defective product should contribute to the workers' award. Post-accident arbitration was proposed as a methodology. See Vol. VII, p. 85-112

Regulating Occupational Health and Safety, Samuel A. Rea, Jr., pp. 109-40, c.s, in "THE REGULATION OF QUALITY: PRODUCTS, SERVICES, WORKPLACES, AND THE ENVIRONMENT", Dewees (ed.), Butterworths: Toronto ISBN 0-409-82495-X. Contains an extensive reference list to approx. 60 articles, books, manuscripts and studies, including those of the neo-conservative U.S. school of political economy

Court Order Enforcement Act, R.S.B.C. 1979, c.75, s.41.1

An entirely new part was added to the act in 1984, under the title "Foreign Judgements". It is reproduced due to its significance.

PART 2.1
FOREIGN JUDGEMENTS

Loss or injury caused by asbestos

41.1 (1) In this section
"asbestos" means naturally occurring, highly fibrous, heat insulating and chemically inert silicate minerals belonging to either serpentine or amphibole groups and includes chrysotile, crocidolite, amosite, anthophyllite, tremolite and actinolite and any other mineral commonly known as asbestos;
"judgement" means
(a) a judgement or order given in a proceeding outside Canada, or
(b) a judgement or order given in another province of Canada resulting from an action on or registration of a judgement or order described in paragraph (a).

(2) Notwithstanding this or any other Act or law, where a judgement is given for loss or injury that arises out of exposure to or the use of asbestos that has been mined in the Province.
(a) the judgement shall not be registered in or enforced by a court, and
(b) a proceeding in respect of the judgement shall not be commenced in a court or, where a proceeding was commenced before this section comes into force, the proceeding shall not be continued.

(3) Where a person has a cause of action under the domestic law of the Province for loss or injury that is suffered outside Canada and arises out of exposure to or the use of asbestos mined in the Province, he may commence an action under the domestic law of the Province, notwithstanding that a judgement has been given in respect of the loss or injury or that a proceeding might have been commenced outside Canada for the same relief.

1984-26-8 effective May 31, 1984 (B.C. Reg 163/84)

Various newspapers, particularly business sections, and business and financial periodicals in the 1985 calendar year, including the Toronto *Globe and Mail*, Toronto *Star*, New York *Times*, Vancouver *Sun*, *Equity* Magazine, *Business Week*, *Wall Street Journal*, *Canadian Business*, New Delhi's *Now* Magazine, *India Today* and the *Financial Post*.